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In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Petitioners,

vs.

LIBERTY NATIONAL BANK AND TRUST OF LOUISVILLE (formerly doing business as United Kentucky Bank, Inc.), UNITED KENTUCKY, INC. and DOES 1-99,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the precluding state court adjudication held to bar further proceedings in the district court, because of the doctrine of collateral estoppel, not preclusive in that it was rendered in violation of the *Constitution of the United States,* Amendment 14, §1 guaranteeing procedural due process?

2. Were Petitioners arbitrarily denied unambiguous rights of Kentucky law regarding the lack of preclusiveness of the summary judgment entered by the state court?

3. Does a finding by a state court that there has been no "fraud," under a common law standard, preclude a

federal court from subsequently determining, as between the same parties, whether there has been a "fraud," under the statutory standard of Title 18, *United States Code*, §1341 (mail fraud)?

4. Is the question of whether evidence is sufficient to support the legal conclusion that a "fraud," as that word is used in Title 18, *United States Code*, §1341 (mail fraud), reposed exclusively in the jurisdiction of a federal court if the question is raised in a federal suit over which the district court otherwise has unquestionable jurisdiction over the parties and the cause of action?

5. After the jurisdiction of a district court attaches to a cause of action, is the jurisdiction equally exclusive as to all of the claims which are a part of the cause of action irrespective of the subject matter or the sovereign from whence the separate claims emanate?

6. Where an in-state plaintiff, by joining an in-state co-defendant, denies an out-of-state defendant the right to remove a state court suit to a federal forum, can the state procedural law governing joinder of claims supercede the provisions of Title 28, *United States Code*, §1332(a) to preclude the out-of-state state court defendant from instituting suit in federal court against the in-state state court plaintiff seeking relief based on claims which the state procedural law mandates or permits filing as counterclaims in the state suit without, thereby, violating the right of the out-of-state state court defendant to procedural due process under the *Constitution of the United States*, Amendment 5 and without violating the Supremacy Clause in Article VI, Cl. 2?

LIST OF ALL PARTIES

The parties in the instant case are four, identified specifically, and unspecified employees and agents (i.e., Does 1-99) of the corporate Respondents. Each is named in the caption of this petition. However, at this time, Respondent, United Kentucky Bank, Inc. has merged by acquisition with Liberty National Bank and Trust Company which is the successor in interest to the corporate Respondent, United Kentucky Bank, Inc. Petitioners are unaware of the organizational infrastructure of the corporate Respondents; thus, Petitioners do not purport to provide such information in this petition.

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OPINIONS DELIVERED BELOW

The opinion delivered below is that of the United States Court of Appeals for the Sixth Circuit ("the Sixth Circuit") decided on January 22, 1985 recommended for full text publication. (App. A) This affirms in part and reverses in part the order of dismissal entered September 30, 1983 by the United States District Court for the Western District of Kentucky ("the district court"). (App. B)

STATEMENT OF GROUNDS FOR INVOKING JURISDICTION

The Sixth Circuit filed its opinion on January 22, 1985. Petition for rehearing was filed by Respondents on February 5, 1985.

Petitioners, for authority to seek review, rely on Title 28, *United States Code*, §1254(1). Petitioners urge this court to grant the petition in accordance with *Supreme Court Rules*, Rule 17.1(a) and Rule 17.1(c) in that: (1) the Sixth Circuit has rendered a decision in conflict with decisions of other federal courts of appeal on the same matter; (2) the Sixth Circuit has decided a federal question in a way in conflict with the Kentucky court of last resort; and (3) the Sixth Circuit has decided a federal question in a way in conflict with applicable decisions of this court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions and statutes involved are lengthy, their citations alone will suffice at this point, and their pertinent text shall be set forth in Appendix I.

Constitution of the United States, Amendment 14, §1.

Constitution of the United States, Article VI, Cl. 2.

Constitution of the United States, Amendment 5.

Federal Rules of Civil Procedure, Rule 12(b)(6).

Federal Rules of Civil Procedure, Rule 13(a).

Title 15, *United States Code,* §1 and §15.

Title 18, *United States Code,* §1341; §1962 and §1964.

Title 28, *United States Code,* §1254(1).

Title 28, *United States Code,* §1332(a)(1).

Title 28, *United States Code,* §1738.

Title 28, *United States Code,* §2283.

Title 42, *United States Code,* §1093.

Kentucky Rules of Civil Procedure, Rule 8.03.

Kentucky Rules of Civil Procedure, Rule 56.01.

United States Supreme Court Rules, Rule 17.1(a).

United States Supreme Court Rules, Rule 17.1(c).

United States Supreme Court Rules, Rule 23.1.

STATEMENT OF THE CASE

The appeal which produced the opinion which this petition seeks to have reviewed was from a judgment on the pleadings by the district court dismissing the complaint by granting the Respondents' motion to dismiss, based on *Federal Rules of Civil Procedure,* Rule 12(b)(6).

Because the chronology of pleading is important to the application of controlling substantive law, Petitioners will recite the order of relevant events in detail. The unfolding of this chronology will reveal the inter-relationship of the instant case and a separate state court proceeding [now pending before this court in the form of a petition for certiorari in *Kenneth R. George and Alberta W. George v. Liberty National Bank and Trust Co. of Louisville,* No. 84-1253 considered by the district court to control the instant case through collateral estoppel and res judicata.

On **October 27, 1981,** Respondent, United Kentucky Bank, Inc. (hereinafter "UKB"), filed a complaint against Petitioners in the Jefferson County, Kentucky Circuit Court initiating a case bearing Docket No. 81CI-09925. This complaint alleged that Petitioners had breached alleged promissory notes, mortgages, and a guaranty agreement. In short, this state court complaint initiated a, more or less, routine mortgage foreclosure suit.

On **January 11, 1982,** Petitioners filed the complaint in the instant case. (App. D) Jurisdiction (a particularly important point) by the district court was invoked both on diversity and exclusive subject matter jurisdiction. The complaint made affirmative allegations against Respondents alleging violation of Title 18, *United States Code,* §1962 ("RICO"), and Title 15, *United States Code,* §1 (Sherman Antitrust Act).

The context of the allegations in the instant case was the *relationship* existing between Petitioners and Respondents which resulted in events which occurred because of those loans. This same relationship spawned the state court suit. By the complaint filed in federal court, Petitioners, in effect, pled that the notes and mortgages were instruments of fraud used by Respondents to wrongfully injure Petitioners. Petitioners alleged that Respondent's, UKB, state suit was filed as a part of and in furtherance of the mail fraud by Respondents. Whether Petitioners are entitled to prevail in the district court is not controlled by whether the instruments, viewed outside the context of the mail fraud *first charged* in Petitioners' federal suit, are valid or invalid.

On **January 13, 1982,** Petitioners filed an answer stating: (1) the state complaint failed to state a claim; (2) the mortgages had been released; (3) service of process was insufficient; (4) the state court lacked jurisdiction; and (5) a general denial of all factual allegations.

On **March 1, 1982,** Petitioners filed a supplemental answer to the state complaint. The supplemental answer described what was set out therein as follows:

> [s]how as *additional defenses* to the claims of Plaintiff . . . particularly described in the copy of said Complaint, attached hereto, incorporated by reference herein, ... (emphasis added)

The complaint incorporated is the one filed in the instant case on January 11, 1982.

On **June 10, 1982,** the district court below entered an order (App. E) overruling the motion of Respondents to dismiss the January 11, 1982 complaint for failure to state a claim.

On **August 20, 1982,** Respondents filed a motion for summary judgment (App. F) in the state court. The motion for summary judgment sought nothing more than a summary adjudication that Petitioners were liable for breach of the notes, mortgages and guaranty.

On **September 10, 1982,** in the state case, Petitioners filed a sworn affidavit by one of the Petitioners making oath to numerous facts. (App. G)

On **October 25, 1982,** the state court entered a written order granting the summary judgment. (App. H) It is this summary judgment which the district court found to have sufficient preclusive effect to bar further adjudication in the instant case. (App. B, pp. A9-A19)

On **June 15, 1983,** Respondents, in the instant case, filed a document entitled "Motion To Dismiss Plaintiffs' Complaint Upon Theory of Res Judicata, Collateral Estoppel and/or The Full Faith and Credit Requirements of Title 28, *United States Code,* §1738."

It was this motion which the district court granted by its memorandum opinion and judgment entered **September 30, 1983.** (App. B, C)

The Sixth Circuit decided the appeal and filed its opinion (App. A) on **January 22, 1985.**

Summarizing the significant events occurring below for present purposes, Petitioners will direct the attention of this court to the crucial facts. Petitioners filed a complaint against Respondents in federal court alleging violations of RICO and the Sherman Act seeking remedy under Title 18, *United States Code,* §1964 and Title 15, *United States Code,* §15. The RICO claims essentially amount to allegations that Respondents overcharged interest, deliberately and intentionally, by inducing Petitioners into a borrower relationship and, in furtherance of the scheme

and device accomplished by *mail* fraud, engaged in various specific acts including, but not limiting to, filing the state suit instituted by Respondent, UKB. In addition, the federal suit filed by Petitioners alleges pendent claims seeking relief under the common law for breach of fiduciary duties, breach of confidence, breach of contract and other such claims.

Petitioners filed suit in federal court relying on the provisions of Title 28, *United States Code*, §1332(a) because of *complete diversity* of citizenship.

Thereafter, Petitioners answered the state suit with general denials. In addition, by incorporation of Petitioners' federal complaint, Petitioners supplemented their answer with affirmative defenses.

In the state court suit, Respondent, UKB, filed a motion for summary judgment in accordance with the very ordinary provisions of *Kentucky Rules of Civil Procedure*, Rule 56, and Petitioners routinely filed a written memorandum in opposition and a sworn affidavit of one of the Petitioners and, thereby, offered proof on virtually every issue material to the claimed right to summary judgment including, but not limited to, the amount owed.

The state trial court entered a summary judgment precisely as requested by Respondent, UKB, *and more*. The state court went beyond the relief sought by the summary judgment and included in the summary judgment a finding that Respondent, UKB, had not been guilty of fraud and had not breached any fiduciary duty to Petitioners.

The motion for summary judgment did not seek a finding on the issue of fraud or fiduciary duties and, if Petitioners had failed to produce competent proof that there was a genuine issue in dispute on a material fact *essential* to *the summary judgment sought*, the summary

judgment could have been entered without any reference to or finding concerning fraud or fiduciary duties. Respondent, UKB, did not move for a summary judgment ruling that it did not defraud Petitioners nor breach any fiduciary duties. The summary judgment motion did not put Petitioners *on notice* that Petitioners were expected to defend against entry of a summary judgment adjudicating that Respondent, UKB, was not guilty of fraud and had not breached fiduciary duties. Petitioners conceded that these were matters of fact that could only be resolved after a plenary hearing and consideration of proof by the *jury demanded by Petitioners.*

In the federal suit filed by Petitioners, Respondents, United Kentucky, Inc. and Does 1-99, were parties-defendant. In the state suit, these Respondents were not parties in any capacity. The district court held that the state summary judgment in favor of Respondent, UKB, precluded the entire federal case and dismissed it in its entirety, including the claims against Respondents, United Kentucky, Inc. and Does 1-99.

The district court, after entry of the state summary judgment, dismissed the entire federal complaint filed by Petitioners because the state court included language in the summary judgment concluding the absence of fraud and that there had been no breach of fiduciary duty. The Sixth Circuit decision agreed with the district court except as to the specific allegations by Petitioners' federal suit relative to fraudulent inducement both as a matter of common law and, if the mails were used, as predicate offenses supporting RICO.

The district court was affirmed by the Sixth Circuit in holding that, although the RICO claims in the federal suit, being exclusive to federal jurisdiction, were not subject to preclusion by res judicata, the doctrine of collateral estoppel created a bar to further consideration. The dis-

trict court reached this conclusion because of the "no fraud" language by the state court.

As to the pendent claims, the district court was affirmed by the Sixth Circuit in the conclusion that the state court had concurrent jurisdiction to adjudicate the common law claims and, since the state court either did or "could have" ruled on those claims, the entry of the summary judgment in state court precluded the district court from further consideration of them because of the doctrine of res judicata.

ARGUMENT

Question One

In a restricted factual context, this court held that historical facts adjudicated in a state court proceeding between adversary litigants who appear subsequently in a federal forum would be barred by collateral estoppel from obtaining a new adjudication in federal court of the same historical fact. *Allen v. McCurry*, 449 U.S. 90 (1980). This court, as strictly defined, adopted the position that whether the prior adjudication had been in a state suit was immaterial in determining whether it applied to establish a bar in a second suit which was federal. This court did not modify in any way the indisputable and universal sub-parts to the doctrine of collateral estoppel that (1) make only factual adjudications ultimate to the proceeding in which they are first adjudicated subject to bar from relitigation; (2) make the *legal significance* of the ultimate facts previously adjudicated immaterial in the subsequent proceeding; and (3) restrict collateral estoppel so that it never bars a subsequent cause of action but only relitigation of a historical fact previously adjudicated as an ultimate fact in a prior suit.

What this court held in *Allen v. McCurry*, supra, of dispositive significance in the instant case, appears as follows in *Allen v. McCurry*, supra, 449 U.S. at 95:

> But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' *to litigate that issue* in the earlier case. (multiple citations omitted) (emphasis added)

This court simply took note of the obvious, i.e., a state court proceeding which has yielded an adjudication in violation of the *Constitution of the United States*, Amendment 14, §1 cannot serve as a bar to a subsequent relitigation of the same matters. Such an adjudication is the same as no adjudication. The standards of the Fourteenth Amendment provide a fair opportunity to adduce and rebut proof in a meaningful way.

Of significance are the words of this court in *Boddie v. Connecticut*, 401 U.S. 371 (1971) at 377-378:

> Prior cases establish, first, that due process requires, at the minimum, . . ., persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. . . . [T]he theme that 'due process of law signifies a right to be heard in one's defense' (citation omitted) has continually recurred . . . . (footnote omitted)
>
> Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' . . . (citation omitted) 'there can be no doubt at a minimum they require that deprivation of . . . property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case' (citation omitted)

> What the Constitution does require is 'an *opportunity . . . granted at a meaningful time and in a meaningful manner,*' (citation omitted) 'for [a] hearing appropriate to the nature of the case,' (citation omitted). (emphasis added)

Carey v. Piphus, 435 U.S. 247, 266 (1978); *Hovey v. Elliott,* 167 U.S. 409, 414 (1897); *Baltimore & Ohio Railroad Co. v. United States,* 298 U.S. 349, 369 (1936); *Brinkerhoff-Faris Trust and Savings Company v. Hill,* 281 U.S. 672, 680 (1929); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972); *Valandis v. Kline,* 412 U.S. 441, 446 (1973); *Federal Trade Commission v. National Lead Company,* 352 U.S. 419, 427 (1957).

A summary disposition, in contrast to a plenary disposition, per se, is neither in compliance with nor in violation of the Fourteenth Amendment. Competent proof necessary to support a judgment which is not countered with any competent proof, *when opportunity to counter is adequately provided,* is a procedure which provides a fair and meaningful means to present and rebut proof. The critical inquiry remains the same. Was there a full and fair opportunity to meaningfully present and rebut proof?

The record shows the proceeding which yielded the state summary judgment fell short of the minimal dictates of procedural due process. That having been established, the rulings of the federal courts below which presume and presuppose that the summary judgment was the result of a fair and full opportunity to present and rebut proof are erroneous because they are based on an erroneous presupposition.

Petitioners have filed a petition for writ of certiorari which is presently pending before this court under the style *Kenneth R. George and Alberta W. George v. Liberty National Bank and Trust Co. of Louisville,* No. 84-1253

by which Petitioners illustrate that the state court proceeding was conducted in violation of the minimal dictates of procedural due process. Here, Petitioners will not repeat the reasons given there, but Petitioners do rely on the positions there taken. Also, were this court to grant the relief sought in that petition, the relief sought by this petition must be granted.

The violation of procedural due process on which Petitioners base the claim in this petition is of equal or greater import than the violation cited in their prior petition. But, here like there, the basis for the claim is the denial of a full and fair opportunity to litigate in the state court over the historical facts. No such opportunity was afforded in state court.

The burden of proof in Kentucky is and remains with a plaintiff. In the state court below, Respondent, UKB, at all times had and retained the burden of proof.

In order to prevail after a plenary hearing, Respondent, UKB, at all times, retained the burden to prove its entitlement to judgment and every element making up its claim by a preponderance standard.

This requirement placed on Respondent, UKB, never changed; therefore, Petitioners never assumed any burden, after filing their answer generally denying the allegations, to go forward with any proof except as and to the very limited extent they elected to do so as a tactical move to block Respondent, UKB, in carrying the burden which the law imposed on it.

The fact that Petitioners included in the answer filed allegations establishing affirmative defenses (*Kentucky Rules of Civil Procedure*, Rule 8.03), in and of itself, imposed on Petitioners no additional burdens of proof. While affirmative defenses must be specially set up in the answer, if a defendant ever intends to rely on them,

merely pleading affirmative defenses imposes no burden on the defendant. Rather, the pleading of affirmative defenses merely provides opportunity for a defendant to prove the allegations made by way of affirmative defense if, and only if, he thereafter chooses.

Respondent, UKB, sought a summary disposition in an effort to pretermit plenary consideration. This tactical move is permitted by *Kentucky Rules of Civil Procedure*, Rule 56.01 and is exceedingly common to American jurisprudence. This move by Respondent, UKB, in no way relieved it of its burden of proof; instead, in order to prevail on the summary judgment motion, Respondent, UKB, increased its burden quantitatively and qualitatively.

Respondent, UKB, as a summary judgment movant, was required to present competent proof as to every element necessary to obtain whatever judgment it sought. By law, all of the proof offered by Respondent, UKB, as a summary judgment movant, is required to be reviewed strictly by drawing every inference in favor of the one against whom summary judgment was requested. If, and only if, sufficient competent proof, against the movant, is offered and stands unrebutted is the movant entitled to judgment.

Petitioners, when faced with having to defend against the motion for summary judgment, assumed a very limited burden which was overlaid with tactical decision making. That is, Petitioners could elect to stand mute if, after appraisal of the proof offered by Respondent, UKB, Petitioners were convinced that it fell short of that necessary to support entry of a summary judgment. *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), cert. den., 103 S.Ct. 2122 (1983). Furthermore, in reaction to a summary judgment motion, the opponent is under no obligation to come forward with proof of affirmative allegations by the opponent. The opponent has

no burden to prove anything. *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 955 n.28 (6th Cir. 1983).

Even if Petitioners had elected the course of muteness and lost, giving the doctrine of collateral estoppel its most expansive reading, nothing more could have been adjudicated by way of historical fact than those facts established by the evidence offered by Respondent, UKB, *essential to the summary judgment sought*. Certainly, by such an election, Petitioners would not have assumed the risk that every possible historical fact, ultimate and mediate, which *might* possibly have been resolved had the case proceeded to judgment after a plenary adjudication would be considered to have been resolved against them forever.

Collateral estoppel is categorically and substantively different from res judicata. For collateral estoppel to attach to a final adjudication of a historical fact, there must have been full and fair litigation actually had and specifically directed to the specific historical fact thereafter adjudicated.

To avoid the entry of a summary judgment, Petitioners were required to present only so much proof as Petitioners deemed necessary to establish a single genuine issue as to a single material fact. The proof presented for that purpose by Petitioners was required to be viewed in the light most favorable to Petitioners. In selecting the quantum and quality of proof to offer in opposition to a motion for summary judgment, Petitioners assumed the risk that the state court would agree that the proof submitted by Petitioners created a genuine issue as to a material fact, but Petitioners did not, and could not constitutionally have been expected to be, assuming the risk that, if the state court found Petitioners' proof ineffective in creating a genuine issue, the result would be a final adjudication as to historical unlitigated facts.

For it to be otherwise, the mere filing of a motion for summary judgment by a party-plaintiff with a simple affidavit verifying the complaint would shift the entire burden of proof to the defendant. By the simple expedient of a motion for summary judgment, a party-defendant would be required to gush forth all of its proof on every conceivable fact of historical significance, both mediate and ultimate, and dispense with the jury demand, examination of witnesses and other minimal requirements for a full and fair hearing.

Also, collateral estoppel differs from res judicata in a very important detail. That is, res judicata bars the same *cause of action* including all claims raised and all claims which could have been raised through the vehicle of the prior *cause of action*. Collateral estoppel has no such "could have been" aspect to it. It is only those historical facts of ultimate significance to the prior proceeding which were actually and specifically adjudicated after a full and fair hearing which are barred.

In the state court below, Petitioners (as defendants and summary judgment opponents) elected to defend against the motion for summary judgment by filing a sworn affidavit executed by one of the Petitioners. (App. G) The state court apparently ignored this proof and entered a summary judgment. Though it may be questionable whether the state court could summarily dismiss the significance of the affidavit, this is not the question presented by this petition.

Rather, the question now presented centers on the violation of procedural due process accomplished by the federal courts below in according collateral estoppel significance to the summary judgment so entered the same as if the historical facts deemed to be precluded by the summary judgment resulted from a full and fair hearing.

Question Two

Both federal courts below held that the scope of the preclusiveness of the state court summary judgment and, presumably, historical facts finally adjudicated by the proceedings preceding the summary judgment is a question governed by Kentucky law. Petitioners accept this as a *sine quo non*.

The federal courts below articulated this as governing law and proceeded to deny Petitioners the benefit of this undisputed rule. The district court below (App. B, p. A12) and the Sixth Circuit (App. A, p. A5) cite as the statement of law by the court of last resort in Kentucky on the scope of res judicata in Kentucky, *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970). This case does not deal with collateral estoppel. The law there articulated has application only to those claims held below to be precluded because of res judicata, i.e., the pendent claims.

Petitioners agree that *Newman v. Newman* is authoritative. The only difference between Petitioners and the courts below as to the holding in *Newman v. Newman* is that Petitioners rely on the *holding*, and the courts below rely on the dicta.

Newman v. Newman, like the instant case, involved prior-case-plaintiffs, as a defendant in a subsequent case, attempting to employ res judicata to bar a prior-case-defendant from litigating certain issues as a plaintiff in a subsequent suit against the prior-case-plaintiffs.

The *Newman* court held that res judicata was *not* broad enough to create a bar to the subsequent suit. By dicta, the *Newman* court recognized that a prior-suit-defendant is subject to being barred by res judicata in a subsequent suit. However, the quantitative majority of the

Newman court opinion deals with why the subsequent suit plaintiff in that case was not barred by res judicata.

Petitioners take no exception to the ruling in *Newman;* instead, Petitioners rely on the unambiguous *holding* there as a definitive statement of Kentucky law on the scope of res judicata. There simply is no way to read the *holding* of the court in *Newman* without concluding that the summary judgment is not accorded sufficient preclusiveness in Kentucky to bar Petitioners' cause of action in the district court below even if the same claims made in federal court (if they could have been) had been made in a Kentucky state court.

This court has recently held that a federal court litigant is bound by the law of the state in which a judgment was rendered on the issue of preclusiveness of a prior judgment. *Migra v. Warren City School District Board of Education,* ..... U.S. ....., 79 L.Ed.2d 56, 104 S.Ct. 892, 896 (1984); *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 466 n.6 (1982). Obviously, a federal court litigant must be entitled to the benefits derived from the state law. Also, this court has ruled that, where a state has a law, to deny a state court litigant access to the benefits of the law is a violation of procedural due process. *Wolff v. McDonnell,* 418 U.S. 539, 557-558 (1974).

The Sixth Circuit may have avoided treating this subject (even though the brief of Petitioners in the Sixth Circuit presented the subject) on the belief that this was a subject to be considered by the Kentucky appellate courts. (App. A, n.1) However, the effect of *Newman v. Newman* was, and remains, a subject which has no bearing on or occasion to be raised in the state trial or appellate courts.

Question Three

The district court held and the Sixth Circuit affirmed that whether or not there had been a violation of Title 18, *United States Code*, §1962 (RICO) was an exclusively federal question;[1] thus, the doctrine of res judicata could not be applied to preclude the right of Petitioners to adjudication by a federal court on the question of whether Petitioners were entitled to relief under RICO. However, the courts below treated "fraud" as if it were a historical fact rather than a legal conclusion based on the combination of several historical facts.

The state court summary judgment does not deal with historical facts but simply recites the legal conclusion that Respondent, UKB, was not liable for fraud and lacked intent. Presumably, the courts below treated the use of the word "fraud" by the state court as a summary statement indicating that the historical facts essential to conclude that there had been no fraud were raised and adjudicated.

For the state court summary judgment to recite that Respondent, UKB, lacked "intent" adds nothing. The question remains: Intent as to and to do what? Until these inquiries are answered, it is impossible to know whether the doctrine of collateral estoppel intervenes to preclude resolution by the federal court of the exclusively federal question as to *mail* fraud occurred.

Mail fraud is alleged in the complaint in the district court to be the predicate offense which repeatedly oc-

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1. Petitioners are aware of the holdings in *Luebke v. Marine National Bank of Neenah*, 567 F.Supp. 1460 (E.D. Wis. 1983) and *Greenview Trading Company, Inc. v. Hershman & Leicher, P.C.*, 473 N.Y.S.2d 722 (1984), but both are factually distinguishable in significant ways and both overlook controlling aspects of RICO including the significance of the predicate offenses. Also, the fact that a state court is enabled to litigate a federal claim does not dictate that a federal-claim-plaintiff or one against whom a federal claim has been made can be forced to litigate the claim in state court against his will.

curred supporting a finding that §1962 was violated. *Mail* fraud, standing alone, is an exclusively federal question which has its genesis in an exclusively federal statute. However, this is doubly so when it becomes an essential mediate fact toward the resolution of federal RICO. Thus, for same reason and to the same extent that a state court determination not sought or consented to by a party in the state court on the ultimate question of whether there has been a RICO violation cannot erect a res judicata bar to subsequent determination of the same question between the same parties by a federal court, *mail* fraud cannot be so resolved by a state court to preclude a federal litigant from a subsequent and independent determination of the same question by a federal court.

The state court summary judgment, giving it its most expansive reading, must be considered to have reached the legal conclusion of no fraud and absence of intent using a Kentucky common law standard. Thus, if one presupposed unstated historical facts essential to the legal conclusion of fraud under the common law of Kentucky and assumed that the state court adjudicated the absence of one of those essential historical facts, the question remains as to whether the absence of whichever of those essential historical facts the state court found missing would be accorded the same legal significance if the ultimate question to be resolved was whether there existed a *mail* fraud. Presumably, there was an attempt to make the state summary judgment find missing the necessary historical fact of intent required by the common law of Kentucky.

But, even if there were a state court litigant fully bound by a state court judgment specifically delineating each and every historical fact of ultimate significance to a legal conclusion of fraud under the common law of

Kentucky, that litigant would be entitled to a subsequent ruling based on those same predetermined facts in order to adjudge the legal conclusion of whether there had been a *mail* fraud, §1341. The same historical facts simply do not have the same legal significance in resolution of the legal conclusion of common law fraud vis-a-vis statutory *mail* fraud. Intent which would fall short of that necessary to support a finding of common law fraud can be fully sufficient to support a finding of statutory *mail* fraud.

This court previously addressed this question definitively in *Durland v. United States*, 161 U.S. 306 (1896) stating as follows at 312:

> In other words, he was trying to entrap the unwary, and to secure money from them on the face of a *scheme* glittering and *attractive in form, yet unreal and deceptive in fact*, and known to him to be such. (emphasis added)

This court continued as follows at 312-313:

> [B]ut the *contention on his part is that the statute reaches only such cases as, at common law, would* come within the definition of "false pretenses" in order to make out which there must be a misrepresentation as to some existing fact, and not a mere promise as to the future. . . . [a]nd then, as counsel say in their brief, it [the indictment] discloses on its face absolutely nothing but an intention to commit a violation of a contract. (emphasis added)

Finally, this court continued as follows at 313-314:

> A question thus presented is one of vital importance. . . . [W]e cannot agree with counsel. *The statute is broader* than is claimed. . . . (emphasis added)

* * *

> But beyond the letter of the statute is the evil sought to be remedied .... [I]t is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes and, even when the matter of chance is eliminated, *any scheme or plan which holds out the prospect of receiving more than is parted with appeals to cupidity* of all. (emphasis added)
>
> * * *
>
> In light of this, the statute must be read and, so read, it includes everything designed to defraud by misrepresentation as to the past or present, or suggestions or promises as to the future. . . . [I]t *would strip it of value to confine it to* such cases as disclose an *actual misrepresentation* as to some existing fact, and exclude those in which is only the allurement of a promise. This, which is the principal contention of counsel, must be overruled. (emphasis added)

Following this clear statement of law by this court, *United States v. Whitmore*, 97 F.Supp. 733, 735 (S.D. Cal. 1951) stated, of the scheme to defraud referenced in the mail fraud statute, that it "[i]s more inclusive than common law 'fraud'." Likewise, *Deaver v. United States*, 155 F.2d 740, 744 (D.C. Cir. 1946) stated of the mail fraud statute that it was "[b]road in scope and not limited by the common law rules . . ." and that the scheme interdicted "[m]ay be fraudulent though no misrepresentation is made. This same ruling appears in *United States v. Hannigan*, 303 F.Supp. 750, 754 (D. Conn. 1969).

The heart and soul of §1341 was classically articulated by The Honorable Learned Hand in *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932) at 749:

> True, the law still recognizes [that] *in bargaining* parties will puff . . . in terms [b]ut *it is no longer law* that declarations of value can never be a fraud. Like other words, they get their color from their setting, and mean one thing when exchanged between traders, and another when uttered by a broker to his customer. Values are facts as much as anything else; they forecast the present opinions of possible buyers and sellers, and concern existing, though inaccessible facts . . . [a]nd while *it may once have been true* that one might safely use them to stuff any gull one brought to hand, liability has expanded as *the law has become more tender towards credulity*. The *defendants* at bar *inveigled* their victims into a *position of confidence* by *pretending* that *they* would collect their claims, and offering them a settlement which they recommended as *advisors*.
>
> • • •
>
> It may be impossible to measure his loss by the gross scales available to a court, but he has *suffered a wrong;* he has *lost his chance to bargain with the facts before him*. This is the evil against which the [mail fraud] statute is directed. (emphasis added)

More recently, the holding of Judge Hand presaged by this court in *United States v. New South Form*, 241 U.S. 64 (1915) has been perpetuated in *United States v. Kreiner*, 609 F.2d 126, 128 (5th Cir. 1980).

The courts below denied Petitioners the right to a federal adjudication of whether a *mail* fraud, as opposed to common law fraud, occurred by misapplication of the rules of collateral estoppel based on the erroneous presumption that common law fraud in Kentucky is either less stringent or the same as *mail* fraud.

The wisdom of the words of The Chief Justice, joined by Mr. Justice White, in dissent, are instructive where

their opinion says as follows in *United States v. Maze*, 414 U.S. 395 (1974) at 405-406:

> I join in the dissent of Mr. Justice White which follows but add a few observations on an aspect of the Court's holding which seems of some importance. *Section 1341* . . . [h]as traditionally been used against fraudulent activity as a *first line of defense*. When a 'new' fraud develops - as constantly happens - the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil. (emphasis added)

Insofar as Petitioners are concerned, the failure of the courts below to follow the ruling of this court has denied them even the right to a hearing.

Question Four

For this question, Petitioners presuppose that mail fraud, as alleged in the complaint is exclusively a federal question. This court has previously recognized, but failed to resolve, whether a federal court litigant can be denied a federal court adjudication of a question which is within the exclusive jurisdiction of a district court. *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978).

While it is unquestionable that res judicata and collateral estoppel, activated by prior state court rulings, both are fully operative as bars to subsequent federal court adjudication of questions which are not exclusively federal, the question remains unresolved by this court as to whether the same deference is accorded state adjudications of exclusively federal questions, especially if the jurisdiction of a district court has attached before the state court rules.

In *Migra v. Warren City School District Board of Education*, ... U.S. ....., 79 L.Ed.2d 56, 104 S.Ct. 892

(1984), this court dealt with a situation where the claim in question (Title 42, *United States Code*, §1983) very clearly "could have been" brought in the state court. The instant case differs in that the RICO claim, with its essential element of mail fraud, *could not* have been decided in the state court against the will of a party. In the instant case, Petitioners made the RICO claims in federal court in the only cause of action filed by Petitioners. It is impossible to allow preclusion of these claims in federal court on a "could have" standard.

What has come from the United States Courts of Appeals and district courts relevant to the inquiry seems most often to be stated in the context of whether a district court can, or should, issue an injunction to stay state court proceedings in order to allow a federal court, in a simultaneous proceeding, to adjudicate issues relevant to the federal court suit prior to an adjudication by a state court. While it is true that Title 28, *United States Code*, §2283 severely restricts issuance of such injunctions, federal courts have commonly relied on the reasoning that a state court adjudication would not have any preclusive effect on subsequent federal adjudications of questions exclusively federal in a simultaneously pending federal suit as the reason why the federal court need not rely on or create an exception to §2283. Lower federal courts seem to have developed a rule that prior state court adjudications relative to questions exclusively federal and not litigable in state court have no preclusive effect on a subsequent federal court adjudication of that question.

In his routinely classic form, this principle was succinctly stated by The Honorable Learned Hand as follows in *Lyons v. Westinghouse Corporation*, 222 F.2d 184 (2nd Cir. 1955) at 189:

> In the case at bar, it appears to us that the grant to the district court of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their [district courts] decisions from prejudgment elsewhere . . . .

The point again was well made in *Avon Publishing Co. v. American News Co.*, 143 F.Supp. 516 (S.D. N.Y. 1956) as follows at 518-519:

> Since a State Court may determine the validity of a contract in the face of a defense which is predicated on the Antitrust Acts and since such determination is not necessarily binding upon the Federal Courts in antitrust actions, it must, therefore, be concluded that it is unnecessary to enjoin the State Court proceeding . . . .

For other treatment of the same subject, see *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 834 (9th Cir. 1963); *Cotler v. Inter-County Orthopedic Association, P.A.*, 526 F.2d 537, 541, 542 (3rd Cir. 1975); *McGough v. First Arlington National Bank*, 519 F.2d 552 (7th Cir. 1975); *Lecor, Inc. v. United States District Court for the Central District of California*, 502 F.2d 104 (9th Cir. 1974); *Movielab, Inc. v. Berkey Photo, Inc.*, 321 F.Supp. 806, 810 (S.D. N.Y. 1970); *Abdin v. Goodbody & Co.*, 339 F.Supp. 1311, 1312 (E.D. Wis. 1972); *Weisseld v. Spartans Industries, Inc.*, 58 F.R.D. 570, 576, 577 (S.D. N.Y. 1972); *Lewis v. Marine Midland Grace Trust Co. of New York*, 63 F.R.D. 39, 52, 53 (S.D. N.Y. 1973).

Petitioners contend that exclusively federal questions raised in a case *where* the *federal court has already attached its jurisdiction* over the parties and the subject matter must be adjudicated in a federal forum, and such an adjudication cannot be precluded by a state court ruling which intervenes between the attachment of the federal court's jurisdiction and a ruling on the question by the

federal court. To deny a federal litigant such a right is to reduce the Supremacy Clause of the *Constitution of the United States*, Article VI, Cl. 2 to meaninglessness and leave the federal court litigant's constitutional and statutory rights hanging on a factor over which he has absolutely no control, i.e., how quickly the district court rules.

Question Five

It is important to note that the jurisdiction of the district court below was invoked and attached *before* Petitioners filed any answer or participated in any other way in the state court proceedings. That is, Petitioners had made no defense in state court until after Petitioners filed the complaint in the district court alleging claims under RICO, antitrust laws and various common law claims. Also, it is important to note that the jurisdiction of the district court below was invoked based on complete diversity relying on Title 28, *United States Code*, §1332(a).

It is the position of Petitioners here, and in the courts below, that, once invoked, the jurisdiction of the district court over all of the claims constituting the *cause of action* filed by Petitioners was equally exclusive over *all* the claims making up the cause of action irrespective of the nature of the claim or whether it emanated in state law or federal law.

Though in a different context and for a different purpose, the same could be said as related to the present question as was stated by this court as follows in *Migra v. Warren School District Board of Education*, supra, 79 L.Ed.2d at 65:

> The definition of 'cause of action' or 'claim' is critical in the present context because it seems that a basic rule . . . is that a person is entitled to one law suit for each 'cause of action' he possesses. (citation omitted)

In the quoted language, this court had reference to Ohio law and its preclusive effect. However, the same principle adheres in determining the scope of the jurisdiction of a district court over that which is filed before it. A district court's jurisdiction is not splintered and split up so that it is of one type as applied to some claims and another type as applied to other claims. The jurisdiction of a district court is either totally exclusive or totally non-exclusive. In other words, pendent claims, until (if at all) a district court, *by its own action*, through dismissal, dispossesses itself thereof, are accorded the same quantum and quality of jurisdiction as non-pendent claims included in the same *cause of action*.

The courts below (App. A, B) proceeded on the opposite assumption. That is, though the district court had affirmatively overruled a motion by Respondents to dismiss the federal complaint, including all but one of the pendent claims (App. E), it subsequently held that the pendent claims were barred from litigation in the district court because they either were or could have been litigated in the state court, and the state court had *concurrent* jurisdiction with the district court as to the pendent claims in the federal complaint.

Petitioners suggest that this ruling by the courts below is in direct contravention of the prior enunciation of the governing rule by this court in *United Mine Workers v. Gibbs*, 383 U.S. 724, 725 n.12, 725 (1966), and the clear implication of the ruling by this court in *Armstrong v. Nu-Enamel Corp.*, 305 U.S. 315, 324-325 (1938). This rule is discussed in the following cases: *Strachman v. Palmer*, 177 F.2d 427, 429, 430 (1st Cir. 1949); *Murphy v. Kodz*, 351 F.2d 163, 166 (9th Cir. 1965); *United Mine Workers v. Meadow Creek Coal Co.*, 265 F.2d 52, 59 (6th Cir. 1959), cert. den., 356 U.S. 1013 (1959); *Lewis v.*

Pennington, 400 F.2d 806, 816 (6th Cir. 1968). Also, see *Hazel Bishop, Inc. v. Perfemme, Inc.*, 314 F.2d 399 (2nd Cir. 1963) and *Roecker v. United States*, 379 F.2d 400, 408 (5th Cir. 1957).

The fact that a district court may have the authority to dismiss or withdraw its jurisdiction over pendent claims, after it has decided that it has no, or desires not to exercise its, jurisdiction over pendent claims, in no way mitigates against the rule discussed above. The district court, and the district court alone, has exclusive jurisdiction over the pendent claims even though that exclusive jurisdiction may include the authority to withdraw exercise of that exclusive jurisdiction. This authority not to exercise jurisdiction in no way changes, mollifies or mitigates the quality, scope and quantity of the jurisdiction which it has.

Petitioners here claim that their right to have a federal court exercise its exclusive jurisdiction over the claims made in Petitioners' federal complaint was pretermitted by an erroneous ruling by the district court, affirmed by the Sixth Circuit, that the jurisdiction of the district court was not exclusive.

Question Six

This question focuses on the diversity of citizenship permitting Petitioners to file the federal complaint. Title 28, *United States Code*, §1332(a). On the date on which Petitioners filed the federal complaint, no proceedings were pending between Petitioners and Respondents, United Kentucky, Inc. and Does 1-99, and the complaint by Respondent, UKB, making allegations to support its contention that there had been a default and that it was entitled to foreclosure was the only proceeding involving Respondent, UKB. Petitioners had not answered or elected to make affirmative claims in state court.

While Petitioners were prohibited from removing the state court action to federal court because Respondent, UKB, had included an in-state co-defendant, Petitioners had never relinquished or had taken from them the absolute statutory right afforded Petitioners under §1332(a). That is, Petitioners had never waived, relinquished, surrendered or otherwise become dispossessed of the *right provided* them *by federal statute* to state whatever cause of action Petitioners had against Respondents in a federal court and obtain adjudication in the federal court of the claims stated in Petitioners' federal cause of action.

Thereafter, but only thereafter, Petitioners adopted the affirmative claims for relief sought in federal court as affirmative defenses and included them as a part of the answer filed in state court. This closely parallels the situation existing in *Lyons v. Westinghouse Corp.*, 222 F.2d 184 (2nd Cir. 1955) and which evoked the language from The Honorable Learned Hand quoted above (p. 24). Inclusion of these affirmative defenses in the answer of Petitioners in state court in no way bound Petitioners to prove the affirmative defenses; rather, this inclusion was necessary only to insure the opportunity to Petitioners at a later date to rely on those affirmative defenses, if Petitioners then desired to do so.

The dismissal by the district court below denied Petitioners the right provided Petitioners under §1332(a) by holding (1) that Petitioners had made the claims making up its federal cause of action in state court and (2) that, to the extent that Petitioners did not make the claims filed in their federal cause of action in state court, Petitioners "could have" done so. As to the first recited holding, Petitioners would simply point out that the record does not support such a conclusion.

As to the second recited holding, Petitioners suggest that the district court permitted a state rule of procedure

to deny Petitioners a substantive right to a federal forum. Petitioners contend that both procedural due process under the *Constitution of the United States*, Amendment 5 and the Supremacy Clause under Article VI, Cl. 2 prohibit stripping Petitioners of substantive rights as was done by the district court below.

Again, in *Migra v. Warren City School District Board of Education*, supra, this court made reference to state procedural rules governing joinder of claims in the context of preclusiveness of state court judgments. This reference appears as follows in *Migra v. Warren City School District Board of Education*, supra, 79 L.Ed.2d at 65:

> In addition, the Ohio Supreme Court in 1970 adopted Rule 13 of the Ohio Rules of Civil Procedure establishing a compulsory counterclaim provision like its federal counterpart in Rule 13 of Federal Rules of Civil Procedure.

This court did not resolve, or attempt to resolve, the effect of such a rule concerning joinder of claims. The quoted point was made simply by way of suggesting relevant questions to be considered by the district court on remand in discerning what Ohio law deemed to be the scope of preclusiveness of judgments.

Further, the issue presented by the instant case is much different from *Migra* from a factual standpoint. In *Migra*, both the plaintiff and the defendant in the district court were resident citizens of Ohio, and the jurisdiction of the district court had been invoked solely on subject matter grounds. Thus, the supremacy of §1332(a) was not there at stake. Here, the supremacy of §1332(a) is of critical significance. Also, in *Migra*, the federal statute providing subject matter jurisdiction to the federal court is a statute which is litigable in state court. A claimant under the federal statute there in question, Title 42, *United States Code*, §1983, has an absolute right to bring the claim in

state court, if he so chooses. However, such a claimant has an equal right to bring suit under §1983 in federal court, if he so chooses. If neither party objects, a §1983 claim can be fully litigated in state court; however, either party has the right to either bring or remove a §1983 claim to federal court.

In the *Migra* case, the federal-court-plaintiff had previously instituted suit as a plaintiff in state court but chose not to include a claim under §1983 in her state cause of action. This is a clear election between available forums by the plaintiff. The cause of action was split with certain claims under the common law and state statutes being made in state court and the §1983 claim being made in federal court. This is in direct violation of the underlying purposes for the doctrine of res judicata to avoid splitting a single cause of action. The plaintiff in *Migra* could have avoided splitting the cause of action by making all the claims in federal court. All this stands for is that a *plaintiff* cannot make a choice to proceed in one court and then *later* have a second bite at the apple in the event the first choice either is unavailing (*Migra*) or not enough (*Luebke*). Nothing similar to this exists in the instant case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this court to either grant their petition for certiorari or, under *Supreme Court Rules*, Rule 23.1, summarily reverse that portion of the decision of the Sixth Circuit (except Section IV pertaining to unfair trade practices).

Respectfully submitted,

PARRISH & MULROONEY, P.C.
By: LARRY E. PARRISH
Attorney for Petitioners

APPENDIX

APPENDIX A

No. 83-5750

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH R. GEORGE and
ALBERTA W. GEORGE,
Plaintiffs-Appellants,

v.

UNITED KENTUCKY BANK, INC., UNITED
KENTUCKY, INC., and DOES 1 through 99,
Defendants-Appellees.

Appeal From the United States District Court for the
Western District of Kentucky at Louisville

Decided and Filed January 22, 1985

Before Contie, Circuit Judge; Phillips, Senior Circuit Judge; and Gilmore, District Judge.*

Phillips, Senior Circuit Judge. This is an appeal by plaintiffs Kenneth R. and Mrs. Alberta W. George (hereafter "Georges") from the judgment of the District Court dismissing their complaint upon the ground that their cause of action and the issues raised therein are barred by the doctrines of *res judicata,* collateral estoppel and the Full Faith and Credit Act, 28 U.S.C. § 1738. The Georges

*Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

also appeal from the earlier order of the District Court dismissing that part of their complaint which alleged a violation of the Kentucky Unfair Trade Practices Act, K.R.S. 365.050. The decision on the latter issue became final and appealable when the District Court dismissed the remainder of the complaint.

The Georges sought damages against United Kentucky Bank, Inc. and United Kentucky, Inc. (hereafter "U.K.B." or "the Bank") and "Does 1 through 99" (unspecified directors and employees who allegedly acted on behalf of the defendant Bank and the defendant Holding Company to establish the policies or to carry out the conduct challenged in this case). The defendants were charged with defrauding the plaintiffs in a series of loans made by the Bank to the Georges. The complaint charged a R.I.C.O. claim, 18 U.S.C. § 1962 (c), which was based in part upon a mail fraud claim, 18 U.S.C. § 1341; and a number of State law claims with jurisdiction asserted upon diversity of citizenship.

I

Prior to the initiation of the present suit by the Georges in the United States District Court, the Bank filed a foreclosure action against the Georges in the Circuit Court of Jefferson County, Kentucky, Case No. 81-CI-09925, styled *United Kentucky Bank, Inc. v. Kenneth R. George, et al.* The basis for the foreclosure action was the Georges' default on a series of five loans made by U.K.B. to the Georges in the original amount of $2,700,000.00.

The Georges filed pleadings in the State Court action, to which were attached a copy of their complaint in the present case. The District Court held that the Georges raised and prosecuted in the State Court action defenses

or counterclaims involving the same questions of law and fact presented in the Federal Court litigation.

After discovery proceedings in the State Court, the Bank moved for summary judgment. The State Circuit Court sustained the Bank's motion for summary judgment on almost all issues. The State Court ruled, however, that the Bank calculated interest on an unacceptable basis and awarded to the Georges a credit of $11,022.58 for overcharges on interest. The State Court expressly held that the Bank was not guilty of any fraud or breach of fiduciary duty owed by it to the Georges "due to the established industry practice followed and lack of intent" by the Bank. After directing that the Georges recover the specified amounts for overcharges on interest, the State Court ordered that "all counterclaims and affirmative defenses as filed by the defendants (the Georges) are hereby dismissed as herein-before set out."

II

The District Court dismissed the complaint in the present case in a memorandum opinion rendered September 30, 1983, holding as follows:

> This Court must give the same recognition to the judicial rulings of the Kentucky courts to which those rulings are entitled in Kentucky. 28 U.S.C. § 1738. *St. John v. Wisconsin Employment Relations Board*, 340 U.S. 411, 414 (1951); *Rollins v. Dwyer*, 666 F.2d 141, 144 (5th Cir. 1982). See, generally, 1B Moore's Federal Practice, Para. 0.416[1] (2nd Ed. 1983). *Res judicata* provides that a final judgment on the merits bars all claims based upon the same complaint by the parties or their privities, including those claims which were not but could have been litigated. *Mon-*

tana v. United States, 440 U.S. 147, 153 (1979); *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940). Collateral estoppel provides that once issues or facts which are necessary to the judgment are actually litigated and decided by a court of competent jurisdiction, any determination by that court is conclusive and binding on the parties in any subsequent suit between the parties, even if the second suit is based upon a different complaint. *Montana v. United States, supra*; *Allan v. McCurry*, 449 U.S. 90, 94-96 (1980). In essence, the parties are bound by issues and facts which have been adjudicated. See generally, *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 102 S.Ct. 1883, 1889 n.6 (1982); *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970); *Restatement (Second) of Judgments*, Sections 17, 18 and 27 (1982).

The District Judge held that the actionable facts in the present case were before the State Court and that the State Circuit Judge reached or could have reached all the issues with the exception of the R.I.C.O. claim. With respect to the R.I.C.O. claim the District Court ruled that the finding by the State Court that there was no "fraud" on the part of U.K.B. was sufficient to act as a collateral estoppel to fraud alleged in the R.I.C.O. action.[1]

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1. After the decision of the District Court, the Court of Appeals of Kentucky in an unpublished opinion rendered February 24, 1984, (No. 83-CA-343-MR) affirmed the decision of the Jefferson County Circuit Court on the issues relating to fraud. However, the State Court of Appeals granted relief on the Bank's cross-appeal with respect to the $11,022.58 credit allowed by the trial court to the Georges. The State Court of Appeals held that the State trial court was correct in all respects "except as to the actual dollar amount allowed as a credit" to the

(Continued on following page)

We affirm in part and reverse and remand in part, for the reasons set forth in this opinion.

III

We agree with the District Judge that a Federal Court must give to a State Court judgment the same preclusive effect as would be given that judgment under the law of the State in which judgment was rendered. 28 U.S.C. § 1738. *Migra v. Warren City School District Board of Education*, ... U.S. ....., 104 S. Ct. 892, 896 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

In Kentucky the doctrine of *res judicata* is applicable when there is identity of parties, identity of causes of action and the first action is decided on its merits. *Newman v. Newman*, 451 S.W. 2d 417, 419 (Ky. 1970); *see also Stephens v. Goodenough*, 560 S.W. 2d 556, 558 (Ky. 1977); *Hays v. Sturgill*, 302 Ky. 31, 193 S.W. 2d 648, 650 (1946). Kentucky courts also apply the doctrine of collateral estoppel. *Ward v. Southern Bell Telephone and Telegraph Co.*, 436 S.W. 2d 794, 796 (Ky. 1968), *overruled on other grounds, Commonwealth of Kentucky Department of Transportation, Bureau of Highways v. Louisville Gas & Electric Co.*, 526 S.W. 2d 820, 822 (Ky. 1975).

The Georges contend that *res judicata* cannot act to bar their absolute right to present their claims in a fed-

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Footnote continued—

Georges. The judgment was reversed and remanded to the State Court for "computation of the difference of fractional percentage to be allowed as the credit."

During the oral arguments of the present case before this Court on September 26, 1984, counsel advised that a motion for discretionary review of the decision of the State Court of Appeals was pending in the Supreme Court of Kentucky. This Court postponed a decision in the present case until action by the Supreme Court of Kentucky on the motion pending in that Court. The Supreme Court of Kentucky entered an order on November 8, 1984 denying the motion for discretionary review.

eral forum. The Supreme Court rejected this contention in *Allen v. McCurry, supra,* 449 U.S. 90, 103-04 (1980).

However, the record in the State Court proceedings reveals that the Georges made a motion in that Court to amend their answer so as to include the affirmative defense of fraud in the inducement, as opposed to fraud in the execution of the contract. The State Court refused to permit this amendment. Since this claim of fraud in the inducement was not adjudicated in the State Court proceedings and arguably could form the basis of a R.I.C.O. action, we conclude that the District Court erred in dismissing the R.I.C.O. claim.

IV

The Georges also charged the Bank with violations of the Kentucky Unfair Trade Practices Act, K.R.S. 365.050. The District Court dismissed this count of the complaint on the ground that this statute is inapplicable to commercial lending institutions. The Georges appeal. We agree with the District Judge's interpretation of the statute and affirm on this issue.

V

The decision of the District Court is affirmed on all issues except the charges of violation of the R.I.C.O. statute, 18 U.S.C § 1962(c), with respect to the allegations of fraud in the inducement. This part of the judgment is reversed for the reasons set forth in the last paragraph of Part III of this opinion. In all other respects the judgment of the District Court is affirmed.

Affirmed in part, reversed in part, and remanded to the District Court for further proceedings not inconsistent with this opinion. No costs are taxed. The parties will bear their own costs on this appeal.

APPENDIX B

(Filed September 30, 1983)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY AT LOUISVILLE

CIVIL ACTION
No. C 82-0021 L(A)

KENNETH R. GEORGE and
ALBERTA W. GEORGE,
Plaintiffs,

v.

UNITED KENTUCKY BANK, INC., UNITED
KENTUCKY, INC., and DOES 1-99,
Defendants.

MEMORANDUM OPINION

Kenneth R. George and Alberta W. George ("Georges") bring this action against the United Kentucky Bank ("UKB") seeking damages for allegedly defrauding the plaintiffs during several loan transactions. Jurisdiction is based upon diversity, 28 U.S.C. §1332. Plaintiffs also allege a complaint under both 18 U.S.C. §1962(c),. "RICO", and 18 U.S.C. §1341. "Mail Fraud." Initially, the plaintiffs moved for an expedited production of documents. This Court sustained that motion in part. The plaintiffs now move this Court to modify that order. The defendants also moved this Court for a protective order precluding discovery on the grounds of *res judicata*, collateral estoppel,

and full faith and credit. The defendants responded contending that such an order would effectively dismiss the case. The plaintiffs subsequently moved to dismiss the case, citing the same grounds of *res judicata*, collateral estoppel, and full faith and credit. 28 U.S.C. §1738; Federal Rule of Civil Procedure 12(b). After careful consideration, this Court sustains the motion to dismiss.

This case arises out of a series of loan transactions between UKB and the Georges. Essentially, the Georges agreed to a "floating" or "variable" interest rate which was based upon a rate described as the "prime rate," a rate which the UKB allegedly charged its best customers. The parties agreed that the rate would fluctuate, but according to the Georges' amended complaint, the UKB "represented to the plaintiffs that, as a matter of fact, defendants UKB and employees were possessed of no reasonable expectation that the prime rate of defendant UKB would ever exceed, at the absolute maximum, thirteen (13%) percent." First Amended Complaint, Para. 26.

Subsequently, the UKB charged the Georges an interest rate in excess of 13%, allegedly due to fluctuating economic conditions. The Georges protested the increased rates and finally ceased payment on the notes. The UKB moved to foreclose the notes and to attach the Georges' property in Louisville which was secured as collateral for the loans. The UKB filed that action in Jefferson Circuit Court (court of general jurisdiction), Louisville, Kentucky. Meanwhile, the Georges filed this action and amended their complaint. Then, the Georges filed an answer in state court, adopting the allegations in this complaint and amended complaint as "additional defenses" and "incorporated by reference" those claims in the state court answer.

After discovery proceedings, the UKB, plaintiff in the state court proceeding, moved for summary judgment. The Georges, defendants in the state court proceeding, contend that the UKB defrauded them by (1) misrepresenting the "prime rate" and (2) calculating the "per annum" interest rate on a 360-day basis rather than on a 365-day basis. The state court overruled the Georges' motion to amend their answer to state the defense of fraud in the inducement relating to the notes.

The Jefferson Circuit Court, the Honorable Richard A. Revell, Judge, sustained the UKB's motion for summary judgment on almost all issues. First, Judge Revell found that the UKB calculated interest on a 360-day basis and that this traditional practice was not acceptable with the use of modern computer technology, and that the defendants (the Georges) were entitled to a credit of $11,022.58 for overcharges on the interest on their loans up to and including March 1, 1981. However, Judge Revell found that the Georges' "claim of breach of fiduciary duty and fraud for plaintiff's calculation using the 360-day basis is unfounded due to the established industry practice followed and lack of intent by the plaintiff (.)" *United Kentucky Bank, Inc. v. George*, 81 CI-09925, Jefferson Circuit Court, October 25, 1982 ("Revell Op."), at 1-2.

Second, Judge Revell found that the UKB "has not been arbitrary in calculation of its prime rate by using the methodology of adjusting its prime rate in conformity with changes by four out of eight money center banks, and further, defendants (the Georges) were granted the same prime rate as all other borrowers similarly situated(.)" Furthermore, Judge Revell found that "the term 'prime rate' as employed by United Kentucky Bank, Inc. and applied to the uncontroverted facts of this action, is not illusory and, therefore, not a breach of the contract

between the parties(,)" and "Kenneth R. George is astute, sophisticated, and experienced borrowers (sic), as reflected in their affidavits in the record." Revell Op. at 2. Finally, the Judge adopted the stipulation of counsel that all loans which were "prime or prime related" were made at the same rate extended to the Georges.

Based upon those facts, Judge Revell found as a matter of law that the setting and charging of the prime rate by the UKB was "not a breach of contract, fraud, or breach of fiduciary duty as to the defendants." Furthermore, "the calculation of interest on a 360-day basis is an overcharge of interest and, therefore, a breach of contract, but is not a fraud or breach of fiduciary duty, owed the defendants by the plaintiff." Revell Op. at 3.

Finally, after ordering that the plaintiffs recover the specified amounts of the notes from the defendants, Judge Revell ordered that "all counterclaims and affirmative defenses as filed by the defendants (the Georges) are hereby dismissed except as herein-before set out." Revell Op. at 5. The judgment was "final and appealable" under Kentucky CR 54.02(1). Revell Op. at 6. This Court notes in passing that Kentucky's CR 56 and Fed. R. Civ. P. 56 are essentially the same as are Kentucky's CR 54.02 and Fed. R. Civ. P. 54(b).

In this Court, the UKB argues that *res judicata* and collateral estoppel bar any further action by the Georges because this Court must give full faith and credit to the state court's determination. 28 U.S.C. §1738. The UKB argues that since the state court found that the UKB had not defrauded the Georges in the setting or charging of the floating interest rate, the Georges are precluded from asserting the RICO and Mail Fraud claims under collateral estoppel. The UKB further argues that the claim for fraud in the inducement is barred by *res judicata*.

In response, the Georges contend that (1) the state court reached its decision on a motion for summary judgment and, therefore, the decision is less binding than a decision reached after a full trial, (2) that the decision is on appeal and is not a "final" decision, (3) that the state court did not apply the same standard of "fraud" necessary to find "fraud" in RICO actions, and (4) that this Court has exclusive jurisdiction over RICO actions and, therefore, has exclusive jurisdiction over this case by pendent jurisdiction. Although the Georges' amended complaint contains ten (10) counts, the Georges' principal concern appears to be Counts 1-3 (RICO) and Count 7 (Fraud in the Inducement).

This Court must give the same recognition to the judicial rulings of the Kentucky courts to which those rulings are entitled in Kentucky. 28 U.S.C. §1738. *St. John v. Wisconsin Employment Relations Board*, 340 U.S. 411, 414 (1951); *Rollins v. Dwyer*, 666 F.2d 141, 144 (5th Cir. 1982). See, generally, 1B Moore's Federal Practice, Para. 0.416[1] (2nd Ed. 1983). *Res judicata* provides that a final judgment on the merits bars all claims based upon the same complaint by the parties or their privities, including those claims which were not but could have been litigated. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Brown v. Felsen*, 442 U.S. 127, 131 (1979); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940). Collateral estoppel provides that once issues or facts which are necessary to the judgment are actually litigated and decided by a court of competent jurisdiction, any determination by that court is conclusive and binding on the parties in any subsequent suit between the parties, even if the second suit is based upon a different complaint. *Montana v. United States, supra; Allan v. McCurry*, 449 U.S. 90, 94-96 (1980). In essence, the

parties are bound by issues and facts which have been adjudicated. See generally, *Kremer v. Chemical Construction Corporation*, ... U.S. ....., 102 S.Ct. 1883, 1889 n.6 (1982); *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970); *Restatement (Second) of Judgments*, Sections 17, 18 and 27 (1982).

The essential question is whether the facts alleged by the Georges in this suit were before Judge Revell in state court. The "Actionable Facts" are alleged in Paragraphs 28-31 of the amended complaint. The Georges allege that the UKB regularly extended credit to other customers at a lower rate than the Georges received. Para. 30 (x and xiii). The Georges also allege that the UKB set the prime rate at the UKB's "sole judgment, discretion, whim, and caprice . . . .", Para. 30(v); that the UKB misrepresented the method in which interest would be computed on a "per annum" basis by computing the interest on a 360-day basis instead of a 365-day basis, Para. 30 (vi, xi, and xii); that the UKB had a superior financial expertise and knowledge which allowed it to take advantage of the Georges, Para. 30 (viii); and that the UKB misrepresented to the Georges that the maximum price rate would not exceed thirteen percent, Para. 30 (iii); and that the UKB made these misrepresentations to the Georges in the context of a long-standing financial relationship which constituted a breach of fiduciary duty, Para. 30 (vii). The Georges allege a RICO violation because the UKB used the mails to send the Georges their interest statements and bills.

This Court finds that Judge Revell reached or could have reached all these issues, with the exception of the RICO claims. Judge Revell found that there was no fraud in the establishment, calculation or application of the prime rate. The allegation of "whim and caprice" is countered

by the Judge's finding of no arbitrary action on the part of the UKB. Judge Revell explicitly found that there was no specific intent to defraud because the UKB followed generally accepted industry practices by establishing its prime rate in reliance on "four out of eight money center banks," that the rate was not "illusory," and that other lenders similarly situated were granted the same rate as the Georges. *Supra*. Therefore, the Georges are precluded from raising any issues dealing with "fraud" in the establishment and application of the prime rate and the act of mailing the interest statements could not constitute a RICO violation. Thus, this Court dismisses Counts 1-3 (RICO), Count 4 (Common Law Fraud), and Count 5 (Misrepresentation) of the amended complaint under collateral estoppel.

Judge Revell also found that the UKB had not been arbitrary in its calculation of the prime rate, that the prime rate was not a breach of contract, and that Mr. George was an experienced borrower. Therefore, this Court finds that these findings are *res judicata* defenses to Counts 4 and 5 above, as well as *res judicata* to Count 6 (Unconscionability) and Count 8 (Reformation of the Contracts). Moreover, Counts 4, 5, 6, 8, and 7 (Fraud in the Inducement) could have been asserted in the state court proceedings. Therefore, the state court judgment is *res judicata* to those Counts for this reason as well. *Chicot County v. Baxter State Bank, supra*; *Stephens v. Goodenough*, 560 S.W.2d 556, 558 (Ky. 1977).

The Georges prevailed in state court on the issue of "per annum" calculation of interest rates. Judge Revell held that the calculation of interest on a 360-day basis was a breach of contract but was not an act of fraud. Therefore, the state court judgment is *res judicata* to Count 9 (Declaratory Judgment - "Per Annum").

Finally, this Court finds that Count 10 (Breach of Confidential Relationship) states a claim for fraud, breach of fiduciary duty and overreaching (unconscionability). Thus, the state court judgment is *res judicata* to this count as well. This Court has already dismissed Count 11 (Unfair Trade Practices).

In the alternative, Judge Revell overruled "all counterclaims and affirmative defenses" advanced by the Georges. Since the Georges incorporated the complaint and amended complaint in their answer, this Court finds that Judge Revell had all the facts and arguments which the Georges advance in this Court before him in state court. Therefore, that portion of Judge Revell's order also operates as *res judicata* to all facts and issues in this complaint which were properly before the state court.

This Court rejects the arguments raised by the Georges. First, a decision based upon summary judgment is "valid" for purposes of both *res judicata* and collateral estoppel. "Both claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) result from summary judgments that rest on the lack of any genuine issue of material fact going to the merits of the claim or defense." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, Sec. 4444 (West 1981). See, e.g., *O'Neill v. Dell Publishing Company*, 630 F.2d 690 (1st Cir. 1980); *Mayer v. Distal Tool & Machine Company*, 556 F.2d 798 (6th Cir. 1977).

While the Georges do not directly argue that a summary judgment is inappropriate for claim and issue preclusion, they attack the point indirectly. The Georges argue in one of their briefs that since they were not the moving party on the motion for summary judgment, therefore they were not required to assert all their de-

fenses, and that this fact detracts from the required "finality" of the state court decision. A party opposing summary judgment may not rely on the pleadings alone but must make some affirmative showing that a genuine issue of fact exists. *Neel v. Wagner-Shuck Realty Company*, 576 S.W.2d 246, 250 (Ky. App. 1978); *Samuels v. Spangler*, 441 S.W.2d 129, 131 (Ky. 1969); *Hayes v. Rodgers*, 447 S.W.2d 597, 600-01 (Ky. 1969). Cf. *Adickes v. Kress Company*, 398 U.S. 144, 161 (1970); *Sherrod v. Piedmont Aviation, Inc.*, 516 F.Supp. 39, 45 (E.D. Tenn. 1978). Kentucky law requires that a party assert all claims and defenses in the same action. *Newman v. Newman, supra*; *Stephens v. Goodenough, supra*. Therefore, the Georges were required to contest the UKB's motion for summary judgment in state court with the requisite showing of a question of fact on each issue. The Georges did not meet that burden and this Court cannot question the state court's judgment on its merits.

Second, this decision is "final" for purposes of *res judicata* and collateral estoppel while on appeal. The parties agree that the decision is *res judicata* while on appeal. See, e.g., *Fidelity Standard Life Insurance Company v. First National Bank*, 510 F.2d 272, 273 (5th Cir. 1975); 1B *Moore's Federal Practice*, Para. 0.416[3] (2d Ed. 1983). However, the Georges argue that the state court decision is not final for purposes of collateral estoppel, relying on *Watson v. Roberts, Scott & Company*, 466 F.2d 1348 (9th Cir. 1972). This Court must accord the same "full faith and credit" to the state court decision to which that decision is entitled in the rendering state under the rendering state's law. 28 U.S.C. §1738. In *Watson*, California law expressly provided that a state court judgment was not final for purposes of collateral estoppel while on appeal. 466 F.2d at 1349. There is no similar statute in Kentucky.

The only Kentucky case which this Court can discover holds that "'an appeal shall not stay proceeding on a judgment unless superedeas (sic) be issued.'" *Small v. Reeves,* 25 Ky. L.Rep. 729, 733, 76 S.W. 395, 397 (Ky. 1903) (dealing with *res judicata,* not collateral estoppel). See, also, *Smith v. Farmer's Bank of Vine Grove,* 21 Ky. L.Rep. 375, 376, 51 S.W. 451 (Ky. 1899). First, there is no record of any supersedeas bond having been filed in this case. Second, this Court notes that both *Small v. Reeves* and *Smith v. Farmer's Bank* were decided under the old Civil Practice Code, since repealed.

Under the new Civil Rules, which are similar to the Federal Rules, there are no reported decisions regarding this issue. Compare CR 62 with Fed. R. Civ. P. 62. With no other authority, this Court adopts the Federal Rule which provides that a decision pending appeal is entitled to both *res judicata* and collateral estoppel effect. *Huron Holding Corporation v. Lincoln Mine Operating Company,* 312 U.S. 183, 188-89 (1941); 1B *Moore's Federal Practice,* Para. 0.416[3], *supra.*

The Georges also argue that the decision is not final because the UKB cannot enforce the judgment. The Georges have filed a petition in bankruptcy (in Florida) and no judgment can be enforced against the Georges under the automatic stay provisions to apply to the "enforcement" of a judgment against the debtor, not to the "finality" of a decision for purposes of prior adjudication. Cf. *Huron Holding Corporation, supra.* Otherwise, a debtor could continue to file "vexatious" litigation while avoiding the traditional bars of prior adjudication in judgments already rendered. This Court finds no support for this position and the Georges cite no authority for this interpretation of the Bankruptcy Code.

Third, Judge Revell's finding that there was no "fraud" in the UKB's actions is sufficient to act as collateral estoppel to fraud in a RICO action. The Georges argue that Judge Revell did not describe the "standard' by which he judged or defined the term "fraud," and that the standards for statutory fraud are more inclusive than the standards for common law fraud. Again, this Court disagrees.

Under Kentucky law, "fraud" consists of the elements of (1) a material misrepresentation, (2) which is false, (3) known to be false or made recklessly, (4) made with inducement to be acted upon, (5) acted in reliance thereon, and (6) causing injury. *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App. 1978); *Scott v. Farmer's State Bank*, 410 S.W.2d 717, 720 (Ky. 1967). Specific intent to deceive, i.e., "scienter" is a required element. E.g., *Godley v. Piedmont Land Sales, Inc.*, 505 F.Supp. 397, 402 (E.D. Ky. 1978); *Bunch v. Bertram*, 219 Ky. 848, 851-52, 294 S.W. 805 (1927).

The Georges' RICO complaint is based upon an alleged mail fraud, 18 U.S.C. §1341. Specific intent is also a required element of this offense. *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980); *United States v. Shipp*, 359 F.2d 185, 188 (6th Cir.), cert. denied, 385 U.S. 903 (1966). "The fraudulent nature of a scheme should not be measured by a technical standard . . . . 'The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity . . . ." *United States v. Stanford*, 589 F.2d 285, 296 (7th Cir, 1978) (citations omitted); *United States v. Kreimer, supra.* In this case, Judge Revell found no specific intent to defraud. The Georges cite no authority demonstrating any difference between "specific intent" in a civil case and "specific intent" in a criminal case or "specific intent" in

a RICO case. Therefore, Judge Revell's finding operates as a bar to any further action on the RICO claim.

Finally, the Georges argue that since this Court has exclusive jurisdiction over RICO claims, this Court has exclusive jurisdiction over *all* related claims arising out of the same nucleus of "operative facts." Therefore, the Georges argue the state court had no jurisdiction to determine the claims which were before it because those claims were also pendent to the RICO claims in this Court. Generally, federal courts may not enjoin state court proceedings. 28 U.S.C. §2283; E.g., *Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1055 (6th Cir. 1977). The fact that an exclusively federal question is raised as a defense to a contract action in state court does not justify the issuance of an injunction staying the state proceeding. *Avon Publishing Company v. American News Company*, 143 F.Supp. 516 (S. D. N.Y. 1956).

The plaintiff cites several cases which stand for the principle that a federal court acquires pendent jurisdiction over related claims when the Court acquires exclusive jurisdiction over one of the claims. That principle is undisputed. However, plaintiff cites no authority for the proposition that once *concurrent* jurisdiction is established, as in this case, federal court jurisdiction supercedes state court jurisdiction in regard to matters over which the state court has proper jurisdiction. While this Court *may* exercise jurisdiction over pendent claims such as those at issue in this case, this Court finds no authority for overruling a valid state court judgment adjudicating those claims, especially *after* the state court has reached a decision. This Court notes that the plaintiffs made no attempt to stay the state court proceedings pending completion of this case.

Had this case come before this Court prior to the state court's decision, this Court could have exercised pendent jurisdiction over the state court claims. However, this Court is now barred from that course by the principle of prior adjudication. Since this Court could not have enjoined the state court proceedings, this Court has no choice but to give full faith and credit to the resulting state judgment. While that judgment did not *directly* adjudicate the RICO claims in Counts 1-3, the judgment did preclude those claims by collateral estoppel.

In summary, this Court finds that the state court judgment disposes of this case on the principles of *res judicata* and collateral estoppel. If the judgment is reversed by the Kentucky Court of Appeals or the Kentucky Supreme Court, the parties may move to reopen the case. Rule 60(b)(5). See 1B *Moore's Federal Practice*, Para. 0.416[1], *supra*. This Court will consider any additional discovery matters should such an event occur. Therefore, this Court will file the plaintiff's surreply memorandum of August 15, 1983, sustain the defendant's motion to dismiss, and overrule all other motions.

A judgment in accordance with this memorandum opinion will be entered this day.

Dated 9/30/83

/s/ Charles M. Allen
Charles M. Allen, Chief Judge

cc: Record of Record

APPENDIX C

(Filed September 30, 1983)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION
No. C 82-0021 L(A)

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Plaintiffs,

v.

UNITED KENTUCKY BANK, Inc., UNITED KENTUCKY, Inc., and DOES 1-99,
Defendants.

JUDGMENT

This case, having come before the Court on various motions, and the Court, having been advised, and having entered its memorandum opinion this day, therefore,

IT IS ORDERED AND ADJUDGED that the plaintiffs' motion to file a surreply brief be, and the same hereby is sustained, and the Clerk shall file the surreply brief.

IT IS FURTHER ORDERED AND ADJUDGED that the defendants' motion to dismiss be and the same hereby is sustained.

IT IS FURTHER ORDERED AND ADJUDGED that all other motions be and the same are hereby overruled.

This is a final and appealable judgment and there is no just cause for delay.

Dated 9/30/83

/s/ Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

APPENDIX D

(Filed January 11, 1982)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

CIVIL ACTION
FILE NO. 82-0021-L(A)
JURY TRIAL DEMANDED

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Plaintiffs

-vs-

UNITED KENTUCKY BANK, UNITED KENTUCKY, INC., and DOES 1 through 99,
Defendants

COMPLAINT

RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS ACT, ANTITRUST, BREACH OF CONTRACT, FRAUD, BREACH OF FIDUCIARY DUTY

COME NOW Plaintiffs, and for their claims against Defendant UNITED KENTUCKY BANK, ["BANK"], Defendant UNITED KENTUCKY, INC. ["HOLDING CORPORATION"], and DOES 1 through 99, alleges and states as follows:

I. *PRELIMINARY STATEMENT*

This is an action brought by the Plaintiffs, KENNETH R. GEORGE and ALBERTA W. GEORGE [collectively Plaintiffs "GEORGE"], to recover statutory damages for violations by Defendants, BANK, HOLDING CORPORA-

TION, and DOES 1 through 99, under (1) the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962 and (2) the Sherman Antitrust Act, 15 U.S.C. §1. In addition, Plaintiffs GEORGE seek to recover damages for breach of contract, fraud, and breach of fiduciary duty. A jury trial is demanded on all claims.

II. *JURISDICTION*

1. The claims in the First and Second Counts arise under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(c). The claim in Count Three arises under the Sherman Antitrust Act, 15 U.S.C. §1. This Court has jurisdiction of said claims, without regard to the amount in controversy or diversity of citizenship of the parties, under the provisions of 18 U.S.C. §1964(a) and 15 U.S.C. §1, et seq., respectively. [28 U.S.C. 1331]

2. The claims in all other Counts arise under the laws of the Commonwealth of Kentucky. This Court has jurisdiction of all claims by virtue of diversity of citizenship. [28 U.S.C. 1332]

III. *PARTIES*

3. Plaintiffs GEORGE, individually and jointly, were the borrowers of certain sums of money from Defendant BANK. At the time of filing of this action, both Plaintiffs were are are residents of the State of Florida, residing in Treasure Island, Pinellas County, Florida.

4. Defendants are identified as follows:

(a) Defendant BANK is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, with its principal place of business in Louisville, Kentucky.

(b) Defendant HOLDING CORPORATION is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, with its principal place of business in Louisville, Kentucky.

(c) DOES 1 - 99 are persons who are actors and/or co-conspirators along with Defendant BANK and Defendant HOLDING CORPORATION, whose names are not presently known to Plaintiffs GEORGE.

IV. *INTRODUCTION*

5. Defendant BANK and Defendant HOLDING CORPORATION, together with Does 1 through 99, are an enterprise which is engaged in and whose activities affect interstate commerce.

6. Commencing on or about October 26, 1978, Plaintiffs GEORGE began a series of borrowing transactions with Defendant BANK.

7. The borrower(s), sums and dates of the aforesaid borrowing transactions are as follows:

Note No.	Borrower(s)	Date	Amount
1	Kenneth R. George and Alberta W. George	10/26/78	$ 750,000.00
2	Kenneth R. George and Alberta W. George	10/26/78	$1,500,000.00
3	Kenneth R. George and Alberta W. George	10/26/78	$ 250,000.00
4	Kenneth R. George and Alberta W. George d/b/a Yorktown Lumber Company	06/04/79	$ 150,000.00
5	Kenneth R. George and Alberta W. George d/b/a Yorktown Lumber Company	11/24/80	$ 50,000.00

8. That copies of the documents evidencing the borrowing transactions between the parties in the form of the Notes designated 1 through 5 above are appended hereto and marked as Exhibits "A" through "E", respectively.

9. The parties continued in their relationship from October 26, 1978 through and including the date of this Complaint, with Plaintiffs GEORGE being the borrowers of various sums, upon which substantial principal and interest payments have been made.

10. That in the above loans obtained by Plaintiffs GEORGE, it was agreed that Plaintiffs GEORGE would be charged interest based upon a specific percentage over Defendant BANK's "prime rate".

11. In the above loans obtained by Plaintiffs GEORGE, it was agreed that Plaintiffs GEORGE would be charged interest based upon a "per annum" or Annual Percentage Rate basis when, in actuality, the interest rate computed by Defendant BANK was higher than the agreed rate.

12. Throughout the entire period of the borrowing relationship described above between Plaintiffs GEORGE and Defendant BANK, Defendant BANK knowingly computed and charged Plaintiffs GEORGE more interest than allowed by the agreement by failing to calculate interest based upon the BANK's true "prime rate".

13. Throughout the entire period of the borrowing relationship described above between Plaintiffs GEORGE and Defendant BANK, Defendant BANK knowingly computed and charged Plaintiffs GEORGE more interest than allowed by the agreement by computing interest based upon actual days divided by 360 rather than actual days divided by 365.

V. COUNT ONE

FIRST COUNT

STATING A CLAIM AGAINST DEFENDANT BANK, DEFENDANT HOLDING COMPANY AND DEFENDANTS DOES 1 THROUGH 99 UNDER §1964 OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT FOR ENGAGING IN A RACKEETING ACTIVITY BY CHARGING MORE THAN THE PRIME RATE

14. The averments of the previously numbered paragraphs of this Complaint are incorporated by reference herein.

15. During the entire period of the business relationship between Plaintiffs GEORGE and Defendant BANK, Defendant BANK, at the direction and behest of Defendant HOLDING COMPANY and one or more of the Defendants DOES 1 through 99, all in conduct of the affairs of the enterprise, knowingly computed and charged Plaintiffs GEORGE interest on its loans at rates greater than the agreed upon rate.

16. During this period of time, Defendant BANK falsely and fraudulently represented to Plaintiffs GEORGE that the rate charged was based on or tied to its "prime rate", i.e., BANK's "prime lending rate", when the rate it, in fact, charged Plaintiffs GEORGE was higher than the agreed upon rate.

17. Defendant BANK's failure to disclose the rate it charged as its "prime lending rate" or best rate, and its failure to charge Plaintiffs GEORGE the agreed upon rate constituted a scheme to obtain interest from Plaintiffs GEORGE by means of false and fraudulent pretenses.

18. In consequence of the foregoing, and in reliance thereon, to their detriment, Plaintiffs GEORGE paid Defendant BANK interest higher than the agreed upon rate.

19. Defendant BANK's scheme to obtain money from Plaintiffs GEORGE involved the regular and systematic use of the mails to send false and fraudulent statements to receive payments and, therefore, constituted a "racketeering activity" as defined in 18 USC §1961 of the Racketeer Influenced and Corrupt Organizations Act, incorporating 18 USC 1341 pertaining to mail fraud.

20. By virtue of these premises, Plaintiffs GEORGE are entitled to recover, under the Racketeer Influenced and Corrupt Organizations Act, 18 USC §1964(c), triple the difference between the interest Plaintiffs GEORGE paid and what Plaintiffs GEORGE would have paid had Defendant BANK, aided and abetted by Defendant HOLDING COMPANY and Defendants DOES 1 through 99, in fact, used that interest rate it imposed upon loans as its "prime lending rate" or best rate, together with costs of this action and reasonable attorneys' fees.

VI. SECOND COUNT

STATING A CLAIM AGAINST DEFENDANT BANK UNDER §1964 OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT FOR ENGAGING IN A RACKETEERING ACTIVITY BY USING THE UNDISCLOSED 365/360 METHOD OF CALCULATING INTEREST

21. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

22. Plaintiffs GEORGE were, during the entire course of the specified relationship with Defendant BANK from

October 26, 1978 to date, indebted to Defendant BANK for certain sums of money upon which loans Plaintiffs GEORGE agreed to pay a specified interest rate on a "per annum" or Annual Percentage Rate basis.

23. During this period of time, Defendant BANK, in conducting the affairs of the enterprise, aided and abetted by Defendant HOLDING COMPANY and Defendants DOES 1 through 99, knowingly computed and charged Plaintiffs GEORGE a rate greater than agreed upon or disclosed to the Plaintiffs.

24. During this period of time, Defendant BANK falsely and fraudulently represented to Plaintiffs GEORGE that it was computing interest on a "per annum" or Annual Percentage Rate basis, when in fact, the rate it was charging was greater than the disclosed rate by virtue of its use of the undisclosed 365/360 method.

25. Defendant BANK's failure to disclose this correct interest rate constituted a scheme to obtain interest from Plaintiffs GEORGE by means of false and fraudulent pretenses.

26. In consequence of the foregoing, and in reliance thereon, to their detriment, Plaintiffs GEORGE paid Defendant BANK interest higher than the agreed upon rate.

27. Defendant BANK's scheme to obtain money from Plaintiffs GEORGE, aided and abetted by Defendant HOLDING COMPANY and Defendants DOES 1 through 99, involved the use of the mail to systematically send false and fraudulent statements to receive payments and, therefore, constituted and continues to constitute a "racketeering activity" as defined in 18 USC §1961 of the Racketeer Influenced and Corrupt Organizations Act, incorporating 18 USC §1341 pertaining to mail fraud.

28. By virtue of these premises, Plaintiffs GEORGE are entitled to recover, under the Racketeer Influenced and Corrupt Organizations Act, 18 USC §1964(c), triple the difference between the interest Plaintiffs GEORGE were required to pay by Defendant BANK's use of the 365/360 method, and what Plaintiffs GEORGE would have paid had Defendant BANK properly calculated the interest, together with costs of this action and reasonable attorneys' fees.

VII. THIRD COUNT

STATING A CLAIM AGAINST ALL THE DEFENDANTS UNDER 15 USC §1 OF THE SHERMAN ANTI-TRUST ACT FOR CONSPIRING TO RAISE, FIX, STABILIZE AND MAINTAIN THE INTEREST RATE CHARGED BY LENDING INSTITUTIONS

29. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

30. Other persons not named Defendants herein have participated as co-conspirators with Defendants in the illegal acts and transactions set forth herein, and will be added as appropriate when identified.

31. For many years past, the exact date being presently unknown to Plaintiffs GEORGE, and continuing up to and including the date of the filing of this Complaint, Defendants named and those unnamed as co-conspirators have engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce in violation of §1 of the Sherman Act, 15 USC §1.

32. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among Defendants and unnamed co-con-

spirators, the substantial terms of which have been to raise, fix, stabilize and maintain the interest rate charged by lending institutions on a loan or use of money.

33. At all times material, the interest rate held out by Defendant BANK to be its "prime rate" was not based upon Defendant BANK's cost of funds, but was announced and imposed by Defendant BANK, aided and abetted by the other Defendants and the unnamed co-conspirators, pursuant to the aforesaid illegal combination and conspiracy.

34. In furtherance of the aforesaid combination and conspiracy, Defendant BANK, the other Defendants and co-conspirators did various acts, including acts to raise, fix, stabilize and maintain the interest rate charged by lending institutions on the loan or use of money.

35. The aforesaid offense against the laws of the United States has had the following effects, among others:

(a) The "prime rate" has been raised, fixed, stabilized and maintained at non-competitive levels;

(b) The interest rates charged by lending institutions has been raised, fixed, stabilized and maintained at non-competitive levels;

(c) Price competition on loans or uses of money between lending institutions on the "prime rate" or other interest calculations has been suppressed;

(d) Plaintiffs GEORGE have been denied the opportunity of obtaining loans or uses of money in a free and competitive market.

36. Plaintiffs GEORGE represent that they had no knowledge of the combination and conspiracy alleged herein, or any facts which may have reasonably led to the discovery thereof until on or about the date of the

filing of this Complaint. Plaintiffs GEORGE could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by Defendants to avoid detection and fraudulently conceal such combination and conspiracy.

37. By reason of the conspiracy by the Defendants hereinabove alleged, Plaintiffs GEORGE paid interest on their obligation to Defendant Bank at a rate higher than the rate which Plaintiffs GEORGE would have had to pay under natural conditions of competition in the absence of such conspiracy. Plaintiffs GEORGE have, thereby, been injured and damaged, in an amount to be determined with precision after discovery and analysis of Defendant Bank's books and records.

38. By virtue of these premises, Plaintiffs GEORGE, under 15 USC §1, are entitled to triple the amount of damages determined to have been sustained by Plaintiffs GEORGE as a result of said combination and conspiracy, together with costs of this action, reasonable attorneys' fees, and equitable relief enjoining Defendants from continuing the acts, conduct, and conspiracy herein alleged.

VIII. FOURTH COUNT

STATING A CLAIM AGAINST DEFENDANT BANK FOR BREACH OF CONTRACT BY CHARGING HIGHER INTEREST THAN THE AGREED UPON PRIME RATE

39. The averments of the previously numbered paragraphs are incorporated herein by reference.

40. By virtue of the above described acts and practices, Defendant BANK agreed that it would impose an interest rate based upon its "prime lending rate" or best rate, but, in fact, charged and received a rate substan-

tially in excess of that rate, in violation of its loan agreements

41. In consequence of the foregoing, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount they, in fact, paid.

IX. FIFTH COUNT

STATING A CLAIM AGAINST THE DEFENDANT BANK FOR BREACH OF CONTRACT BY COMPUTING INTEREST BY USE OF THE 365/360 METHOD

42. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

43. By virtue of the above described acts and practices, Defendant BANK breached its loan agreements by charging interest on a 365/360 method instead of honoring its contract with Plaintiffs GEORGE, which required interest to be computed on a lower basis of 365/365, "per annum" or Annual Percentage Rate.

44. In consequence of the foregoing, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount they, in fact, paid.

X. SIXTH COUNT

STATING A CLAIM AGAINST THE DEFENDANT BANK FOR FRAUD ARISING OUT OF THE CHARGING OF HIGHER INTEREST THAN THE AGREED UPON PRIME RATE

45. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

46. In entering into its contract with Defendant BANK, Plaintiffs GEORGE relied upon the representations contained in the loan agreements whereby Plaintiffs GEORGE were to be charged interest tied to the "prime lending rate" or best rate.

47. Defendant BANK willfully failed and refused to honor its commitments to charge Plaintiffs GEORGE interest tied to its "prime lending rate" or best rate, but, instead, charged and collected interest at a rate higher than a rate tied to its "prime lending rate" or best rate.

48. That by relying upon such representations of Defendant BANK, Plaintiffs GEORGE were damaged in an amount equal to the difference between the amount actually charged and the amount that should have been charged based upon the best rate then in effect.

49. The above described acts and practices of Defendant BANK were wilful and deliberate, constituting a fraud upon Plaintiffs GEORGE.

50. In consequence of the foregoing acts of fraud, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount, in fact, paid, and all consequential damages and all punitive damages, in amounts to be determined after discovery, plus reasonable attorneys' fees and costs of this action.

XI. SEVENTH COUNT

STATING A CLAIM AGAINST DEFENDANT BANK FOR FRAUD ARISING FROM THE COMPUTATION OF INTEREST BY USE OF THE 365/360 METHOD

51. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

52. In entering into their agreements with Defendant BANK, Plaintiffs GEORGE relied upon the representations contained in various documents whereby Plaintiffs GEORGE were to be charged interest calculated on a "per annum" or Annual Percentage Rate [365/365 method].

53. Defendant BANK willfully failed and refused to honor its commitments to charge Plaintiffs GEORGE interest calculated on a 365/365 basis, but, instead, charged and collected interest calculated on a different basis [365/360 method], resulting in higher interest.

54. That by relying upon such representations of Defendant BANK, Plaintiffs GEORGE were damaged in an amount equal to the difference between the amount actually charged and the amount that should have been charged based upon a calculation on the agreed 365/365 method.

55. The above described acts and practices of Defendant BANK were wilful and deliberate, constituting a fraud upon Plaintiffs GEORGE.

56. In consequence of the foregoing acts of fraud, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount, in fact, paid, and all consequential damages and all punitive damages, in amounts to be determined after discovery, plus reasonable attorneys' fees and costs of this action.

XII. EIGHTH COUNT

STATING A CLAIM AGAINST THE DEFENDANT BANK FOR BREACH OF FIDUCIARY DUTY BY CALCULATING HIGHER INTEREST CHARGES THAN THE AGREED UPON PRIME RATE

57. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

58. By virtue of the above described acts and practices, it was agreed and understood that Defendant BANK would take upon itself to do the calculation of the appropriate interest charges each month, and bill Plaintiffs GEORGE accordingly.

59. By virtue of its undertaking to compute interest and transmit bills for the same, Defendant BANK took upon itself a fiduciary duty in favor of Plaintiffs GEORGE to determine honestly and precisely what the correct rate would be for "large commercial borrowers on short term unsecured loans".

60. Defendant BANK did not compute Plaintiffs GEORGE's interest based upon Defendant BANK's "prime lending rate" or best rate but, instead, used a different and higher "prime rate", in wilful violation of its fiduciary duty and to the detriment of Plaintiffs GEORGE.

61. In consequence of the foregoing, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount in fact paid, and exemplary damages, plus reasonable attorneys' fees and costs of this action.

XIII. NINTH COUNT

STATING A CLAIM AGAINST DEFENDANT BANK FOR BREACH OF FIDUCIARY DUTY IN COMPUTING INTEREST BY USE OF THE 365/360 METHOD

62. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

63. By virtue of the above described acts and practices, it was agreed and understood that Defendant BANK would take upon itself to do the calculation of the appro-

priate interest charges each month, and bill Plaintiffs GEORGE accordingly.

64. By virtue of its undertaking to compute interest and transmit bills for the same, Defendant BANK took upon itself a fiduciary duty in favor of Plaintiffs GEORGE to determine honestly and precisely what the correct rate would be based upon the agreed 365/365 method.

65. Defendant BANK did not compute Plaintiffs GEORGE's interest based upon the 365/365 method, but, instead, used the different and higher 365/360 method, in wilful violation of its fiduciary duty and to the detriment of Plaintiffs GEORGE.

66. In consequence of the foregoing, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount in fact paid, and exemplary damages plus reasonable attorneys' fees and costs of this action.

XIV. COUNT TEN

STATING A CLAIM AGAINST DEFENDANT BANK UNDER KRS 365.060 BY DECLARING THE CONTRACTS VOID IN VIOLATION OF KRS 365.050

67. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

68. The undisclosed granting of loans below the "prime lending rate" or best rate, and of interest calculations of exactly "per annum" rather than excess thereof, to customers of Defendant BANK other than Plaintiffs GEORGE, constitutes a secret rebate, refund and/or unearned discount. Such rebate, refund and/or unearned discount is a privilege not extended to all borrowers so

situated, upon like terms and conditions; and constitutes an injury of competitors and of competition in general, tending to destroy competition, all in violation of KRS 365.050.

69. The contracts between the parties are, therefore, void in accordance with the provisions of KRS 365.060.

70. In consequence of the foregoing, Plaintiffs GEORGE are entitled to have this Court declare the contracts between the parties null and void, and to further declare the Defendant BANK entitled to recover nothing, whether interest, principal, or otherwise.

XV. COUNT ELEVEN

STATING A CLAIM UNDER KRS 365.070 AGAINST DEFENDANT BANK FOR TREBLE DAMAGES

71. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

72. The undisclosed granting of loans below the "prime lending rate" or best rate, and of interest calculations of exactly "per annum" rather than excess thereof, to customers of Defendant BANK other than Plaintiffs GEORGE, constitutes a secret rebate, refund and/or unearned discount. Such rebate, refund and/or unearned discount is a privilege not extended to all borrowers so situated, upon like terms and conditions; and constitutes an injury of competitors and of competition in general, tending to destroy competition, all in violation of KRS 365.050.

73. By virtue of the above described acts and practices, Plaintiffs GEORGE are entitled to recover from Defendant BANK three times the difference between the

amounts agreed to be paid as calculated based upon the best rate and upon the agreed 365/360 method, and the amounts, in fact paid, plus reasonable attorneys' fees and costs of this action.

WHEREFORE, Plaintiffs pray for Judgment against Defendants as specified in each of the eleven (11) counts hereinabove, and trial by jury on all issues.

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By /s/ (Illegible)
Attorneys for Plaintiffs
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Of Counsel for Plaintiffs
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EXHIBITS A THROUGH E ARE NOT INCLUDED FOR THE PURPOSES OF THIS APPENDIX.

APPENDIX E

(Filed June 10, 1982)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION
No. C 82-0021 L(A)

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Plaintiffs,

v.

UNITED KENTUCKY BANK, UNITED KENTUCKY,
Inc. and DOES 1 through 99,
Defendants.

ORDER

This matter is before the Court on defendants' motion to dismiss. The Court has carefully considered all the points raised by defendants, and concludes that there is no basis for saying the complaint completely fails to state a claim. The Court specifically rejects the argument that there is no coverage under 18 U.S.C. Secs. 1962 and 1964 absent an allegation of connection with organized crime and that the pleadings adequately comply with the requirements of the statutes and the Federal Rules of Civil Procedure. While the Court is intrigued by defendant's allegation that the

complaint is defective because it fails to allege employment or association of the defendant bank with any enterprise, consideration of recent United States Supreme Court authority suggesting the need for a broad interpretation of the relevant statutes, and the observation that no authority has been cited in support of the contention combine to convince the Court that the argument is without merit. Accordingly,

IT IS ORDERED that defendants' motion to dismiss be and it is hereby overruled.

Dated 6-10-82

/s/ Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

APPENDIX F

(Filed August 20, 1982)

No. 81 CI-09925

JEFFERSON CIRCUIT COURT
FOURTH DIVISION

UNITED KENTUCKY BANK (formerly d/b/a LOUISVILLE TRUST BANK),
Plaintiff,

v.

KENNETH R. GEORGE, ET AL.,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Comes the plaintiff, United Kentucky Bank, Inc. ("UKB"), by counsel, and moves the Court, pursuant to CR 56, to enter the accompanying order granting plaintiff summary judgment on the grounds that there are no issues of material fact and that plaintiff is entitled to a judgment as a matter of law; and to enter plaintiffs previously submitted order of sale and judgment in personam. In support of this motion, plaintiff submits its memorandum attached hereto.

Barnett & Alagia
By /s/ Richard Frockt
Richard Frockt
By /s/ Thurman L. Sisney
Thurman L. Sisney
By /s/ Lester I. Adams, Jr.
Lester I. Adams, Jr.
1700 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 585-4131
Counsel for Plaintiff, United Kentucky Bank

Certificate of Service

It is hereby certified that on this 20th day of August, 1982, a copy of the foregoing motion, attached memorandum and tendered order was hand-delivered to Mr. Theodore H. Amshoff, Jr., Esq., Mr. Richard W. Hill, 1445 Starks Building, 455 Fourth Avenue, Louisville, Kentucky 40202, and mailed to Mr. Larry E. Parish and Mr. John J. Mulrooney, Parish & Mulrooney, 2125 First Tennessee Building, Memphis, Tennessee 38103, by depositing a copy of same, postage prepaid, in the United States mails, postage prepaid, in accordance with the Kentucky Rules of Civil Procedure.

/s/ Thurman L. Sisney
Thurman L. Sisney

APPENDIX G

(Filed September 10, 1982)

No. 81CI-09925

JEFFERSON CIRCUIT COURT
FOURTH DIVISION

UNITED KENTUCKY BANK (formerly
d/b/a LOUISVILLE TRUST BANK)
Plaintiff/Counterdefendant,

v.

KENNETH R. GEORGE, ET AL.,
Defendants/Counterplaintiffs.

AFFIDAVIT OF KENNETH R. GEORGE

Comes now affiant, Kenneth R. George, defendant/counterclaimant in the instant case, and states as follows:

1. I am over eighteen (18) years of age, am fully competent to act on my own behalf and have firsthand knowledge, to the degree stated, of all matters herein stated by me and am relying on my present best recollection to make the following statement.

2. I am the maker of the promissory notes (hereinafter "the notes") which are the subject of the lawsuit above styled.

3. Through January 1981, I timely paid what United Kentucky Bank (hereinafter "UKB") claimed was owed by me under the notes.

4. On February 12, 1981, I advised the appropriate employees of UKB that I would refuse to make

further payments under any of the notes until UKB took definitive action to correct overcharges under the notes about which I had continually advised UKB and protested for approximately fourteen (14) months.

5. Other than one payment of approximately two thousand ($2,000.00) dollars made in 1981, not because of liability but for the purpose of attempting to better my bargaining position, and seventy-one thousand ($71,000.00) dollars to obtain eleven lot releases in keeping the nine and three-fourths (9.75%) percent flat rate loan current until UKB filed disclosure, I have made no further payments under the notes, and UKB has taken no steps toward correcting the overcharge situation.

6. Prior to making the notes, I was assurred (sic) by UKB that, though I agreed to pay interest calculated by a variable rate tied to prime, if the UKB prime rate ever exceeded twelve (12%) percent, my rate would be capped. At the time the UKB prime rate was claimed by UKB to exceed twelve (12%) percent, I complained that I was being overcharged in relation to what I had agreed to pay as interest. For the succeeding fourteen (14) months, I constantly complained and took every means I knew at my disposal to convince UKB to perform according to its promise to me and cap my interest rate. During that fourteen (14) month period, the interest rate which UKB claimed to be its prime climbed steadily to twenty-one (21%) percent. Even though complaining and doing all I knew to do to obtain relief during the fourteen (14) month

period, I paid what UKB claimed was due. Finally, in February 1981, exasperated by the refusal of UKB to recognize or perform in accordance with its promise to me, I ceased making further payments as demanded by UKB and notified them of my intentions. I initially took such action hoping thereby to gain recognition by UKB of the fact that they could no longer ignore the requirements of their promise.

7. After I ceased making payments under the notes in February 1981, UKB, over specific instructions by me not to do so, sold common stock pledged by me as security for the notes. This common stock was stock which I had accumulated over the years in a planned effort to provide retirement income. I vociferously objected to this action by UKB and was told, in response, that the action had been taken in order to "get my attention." From that point forward, I lost confidence that UKB had ever dealt in good faith. I then undertook to reeaxamine the totality of my relationship with UKB using every source at my disposal to determine if I had been victimized by UKB in other ways previously unknown to me. Prior to that time, I chose to believe that the refusal of UKB to recognize their obligation in relation to capping my interest rate, no matter how serious, had been the result of a mistake, oversight or error. After that time I determined in my own mind that their action had been deliberate and pre-planned.

8. Since October 26, 1978, I have had the use of UKB money dispersed (sic) to me under the notes. Because I have not, as yet, had the opportunity

to review UKB records and compare them with my own, it is impossible for me to know precisely at what time I had exactly how much money representing the principle balance of the notes. Further, it is impossible for me to know precisely how much money I have paid to UKB under the notes for among all of the exchanges and transactions between UKB and me. However, I have made an attempt to review the records available to me and to make the best estimate, from those records, I can concerning what monies have been exchanged between UKB and me as a result of the notes. According to the best information presently reviewed by me, not including UKB records, it appears that, fairly soon after October 26, 1978, I received use of $2,100,000.00 of UKB money. Between that time and February 1981, I paid approximately $1,725,000.00 to UKB as a result of the notes. In addition, in March and December 1981, UKB, over my strenuous objection, sold retirement stock pledged by me and my wife as security for the loans. From this, according to the best information I have, UKB realized amounts of approximately $560,000.00. This totals $2,285,000.00 thus far paid by me for the use the (sic) UKB's $2,100,000.00 since shortly after October 1978 or for a period just less than four years. In June 1982, judging from the default judgment entered, UKB then claimed entitlement to approximately $2,400,000.00 additional, from me. If the $2,400,000.00 had been paid in June 1982, this would have resulted in a profit to UKB of approximately $2,685,000.00 as a result of my use of its $2,100,000.00 for approximately three and one-half years. From the

best information available to me, I am lead to believe that UKB is claiming entitlement to continuing interest at a rate of approximately $1,000.00 per day. Thus, if UKB collected what it claims to be entitled to through August 30, 1982, it would realize a profit of approximately $2,800,000.00 for my use of their $2,100,000.00 since shortly after October 1978.

9. After having attended Georgia Tech and spending a few years as an employee of United States Corp of Engineers, I went in business in a small way as a residential builder in Louisville in the mid-1950's. I started by building one or two houses at a time. From that base, I continued to expand my activities and become, in addition to a builder, a residential subdivision developer with some other commercial building from time to time. Over the years, up through 1980, I have built approximately 900 residences in Louisville among other structures. The business has, prior to 1981, continued to expand and has been financially successful.

10. During my years in business, or before for that matter, I have never filed or had filed against me bankruptcy proceedings. More than that, I have never been involved in suits between myself and creditors. Since I have been in business, I have borrowed or been the guarantor on millions of dollars in borrowings and, in the normal course of business, have been indebted to suppliers and others for services rendered but never remember a suit with a creditor over any amount, large or small, until the present difference with UKB.

11. At the point when I ceased making payments to UKB, in February 1981, I was solvent and had

assets and resources adequate to pay the full amount of principle and interest which UKB then claimed was due under the notes. Further, I was not dependent on the income from the subdivision development for the necessary funds with which to pay UKB and did not require loans to obtain the money to pay UKB. UKB offered to loan me the money necessary to pay to UKB everything UKB then claimed it was owed under the notes, but UKB refused to recognize that it had overcharged me.

12. In 1976 and 1977, I conceived a plan to develop a residential subdivision and accessory buildings. After I decided on the exact location and made preliminary estimates as to the possible costs involved in implementing the plan, I took other preliminary measures. Critical to whether the plan was feasible was the availability of borrowed funds with which to complete the project. The cost of those funds was perhaps the single most important factor to my decision to proceed or not proceed. Therefore, after the initial study on my part, I commenced calling on my account officer at UKB sharing ideas and getting feedback. This included site inspections and other preliminary reviews. In this context, I was told that money would be available to me on loan from UKB when I needed it. I discussed in detail with my account officer the cost or possible cost of funds. I told him the maximum I felt I could pay for funds for the project and expressed my concern about signing a variable rate note for a long-term project and the possibility of anticipated costs of funds becoming prohibitive. At that time, I was told by my account officer that

it would be unreasonable for me to anticipate that the UKB prime rate would exceed (12%) percent and that I could proceed on the assumption that funds would be available when needed from UKB on that basis. Since my interest rate was tied to prime by a fixed differential, this gave me definite information on which to act. Based on these assurances, I purchased an option on the land and started work on the subdivision under an agreement with the land owner. In May 1978, the time came when I needed the funds which I had been assured would be available at UKB. At that point, I had been assigned a new account officer and with him, Mr. Gatterdam, I negotiated the terms of the loans now represented by the notes. Mr. Gatterdam made the same assurances about UKB protecting me from an interest rate tied to a prime in excess of twelve (12%) percent. With those assurances restated, I made the note which commenced the funding. In October 1978, the loan originally negotiated in May 1978 was restructed into three notes. If I had had the slightest suspicion that I would ever be called upon to pay interest on loans necessary to complete the subdivision project at a rate higher than thirteen and one-half (13 1/2%) percent, I would never have proceeded with the plan. The assurances made by UKB concerning the interest rate cap was the critical factor in my decision to proceed.

13. All of the notes which I have signed at UKB have been on preprinted forms supplied by UKB to which I affixed my signature after UKB filled in blanks.

14. Over the years in which I have been in business in Louisville, I have dealt extensively with almost all of the savings and loans institutions and with four banks, including UKB. My dealings with the savings and loans have involved the financing of residences and apartment complexes which I have built from time to time. The reason I have had such extensive dealings with many different savings and loans is the practice which I have followed in shopping interest rates. Even when interest rates were stable, I made it a practice to dicker, compare and bargain to obtain the lowest interest rate possible. I placed loans intentionally at several different lending institutions at the same time with the interest rate being the controlling factor.

15. My dealings with banks have involved subdivision development primarily. There again, I remained in close contact with interest rates at competing institutions. I tried to deal with one bank primarily. The reason I ceased doing business at the Bank of Louisville is because my account officer became irritated that I shopped rates. On one occasion, I reminded him that I felt the Bank of Louisville's rates were not the lowest rates available. The loan officer's reaction was anger and a demand that I pay all of my borrowings within thirty (30) days and not have further dealings with the Bank of Louisville. This occurred in 1970 and caused me to act on the recommendation of a friend to establish a banking relationship with UKB. From 1970 up to approximately 1980, my relationship with UKB could not have been more favorable. I was extremely loyal and satisfied. The trust I placed in UKB was unparalleled in my other business dealings.

16. Early in my business career, I became familiar and conversant with the term "prime rate." I used it repeatedly and continuously in my relationship with lending institutions. It was a term which was so commonly used and so central to my banking relationships that it was used with no more thought or hesitation than use of the most common and basic words and phrases. By 1970, I had no doubt about the definition of "prime rate." It was used by me and, to my knowledge, by everyone with whom I communicated by use of such terminology to mean the absolute lowest rate of interest which the institution in question at the time extended credit to business borrowers. Until June 1981, nothing had ever happened in my experience and no information ever crossed my mind to indicate that anyone had any different or modified definition for the term.

17. As for the meaning of the term "per annum," I derived my understanding of its definition through use of the English language and its usage primarily in the context including the description of the period of time for which stated rates of interest would be charged for the use of borrowed money. Until I asked Helen Hamilton, the note teller at UKB, to assist me in reconciling the difference in my calculations and those of UKB relative to the amount of interest I was asked to pay through billings, I had no idea that "per annum" meant less than a year when used by anyone for any purpose. When I inquired of Helen Hamilton, long after October 1978, as related above, she explained to me that I was arriving at an amount of interest due less than the amount which UKB

claimed was due because I was assuming that a year was made up of 365 days and the bank operated on the assumption that "per annum" made reference to a period of time which included only 360 days. At that time, I complained to Mrs. Hamilton, that this, too, constituted an overcharge. Her response to that complaint was to refer me to Jack Colvin who had been my account officer at UKB before Mr. Gatterdam. I discussed the matter with Jack Colvin who merely informed me that this was a common practice in banking. At the time I signed the notes, I intended to obligate myself to pay to UKB accrued interest on a quarterly basis calculated so as to yield the amount which would be payable after a year if the principle balance at the end of a quarter were to remain outstanding for a year divided by the actual number of days I had, up to that time, had use of the borrowed money. It never crossed my mind that UKB nor any other person proceeded on the assumption that a year had less than 365 days.

18. With the same caveats included in paragraph 8 above, my best effort to calculate the amount of interest thus far paid by me in excess of what I would have paid if UKB had calculated my interest assuming a year rather than a 360-day period, yields an estimate between $22,000.00 and $27,000.00.

19. I repeatedly requested UKB to recalculate my interest using a year rather than a period of 360 days as the basis for computation. UKB refused.

20. In June 1981, I read a newspaper article in the Louisville newspapers reporting that a commercial

borrower from UKB had sued UKB on the premise that UKB had tied his prime-plus loan to a rate which was higher than the UKB prime rate. This is the first time I had ever heard of such a thing. It had never before occurred to me that UKB would or may have misrepresented to me what their prime rate was. However, with the information which was reported in the newspaper, I commenced further inquiry to learn that documents revealed during the trial about which the newspaper reported revealed that, during the period when my loans at UKB were outstanding, UKB had extended credit to other commercial borrowers at rates less than what UKB had reported its prime to be. The newspaper report and information I subsequently received informed me that UKB had been found liable to the borrower. I then knew that if liability existed in that case, I had been similarly victimized.

21. During the entire period I have been a borrower at UKB, I have never had access to any information as to what the lowest rate of interest at which UKB extended credit to business borrowers on short term loans other than what UKB told me on request or what appeared on the statements which I received from UKB notifying me of the amount they claimed was owed and advising me to pay same. Until after June 1981, I never questioned that the amount which they advised me was, in fact, their prime. I vested total and unquestioned confidence in UKB to advise me accurately in this regard.

22. Prior to August 26, 1982, the date I was advised of its existence, I had no knowdlege that

there existed an article entitled "I Can Get It For You Wholesale" printed in the May 1, 1977 *Forbes Magazine*. Further, I had no knowledge of the information which was reported therein.

23. Based on remarks made by counsel for UKB in open court in my presence and on my own approximations, UKB has charged and claimed entitlement from me interest at rate of approximately $1,000.00 per day since I signed the notes.

Further deponent sayeth not.

/s/ Kenneth R. George
Kenneth R. George

STATE OF KENTUCKY
COUNTY OF JEFFERSON

Sworn to and subscribed before me this 7th day of September 1982.

/s/ Theodore H. Amshoff, Jr.
Notary Public

My commission expires 5/25/1985.

APPENDIX H

(Filed October 25, 1982)

No. 81 CI-09925

JEFFERSON CIRCUIT COURT
FOURTH DIVISION

UNITED KENTUCKY BANK, INC.
(formerly doing business as
Louisville Trust Bank),
Plaintiffs,

vs.

KENNETH R. GEORGE, ET AL.,
Defendants.

SUMMARY JUDGMENT

The motion of the plaintiff, United Kentucky Bank, Inc., having been made for summary judgment pursuant to CR 56, and it appearing that there are no material issues of fact, the Court finds that:

1. (a) The plaintiff, United Kentucky Bank, Inc., calculated interest on the loans for the defendants on a 360 day basis. The Court is of the opinion that this traditional practice is not acceptable with the use of modern computer technology and, therefore, the defendants are entitled to a credit on the amounts granted by this judgment in the sum of $11,022.58 for over charges on interest on the notes of the action to March 1, 1981;

(b) The defendants claims of breach of fiduciary duty and fraud for the plaintiff's calculation using the 360 day basis is unfounded due to the established industry practice followed and lack of intent by the plaintiff;

(c) That the plaintiff has not been arbitrary in calculation of its prime rate by using the methodology of adjusting its prime rate in conformity with charges by four out of eight money center banks, and further, defendants were granted the same prime rate as all other borrowers similarly situated;

(d) That as to the mortgage recorded at Mortgage Book 1809, Page 918, in the office of the clerk of Jefferson County, and the note for $250,000.00 dated October 26, 1987, and being all of count three of plaintiff's complaint, was not in default at the time of filing of the complaint, and further the mortgage not providing security to any other debts of the defendants due to certain portions of the mortgage not being properly completed, the plaintiff's complaint is dismissed as to count three without restraint on the plaintiff to refile its complaint for a default occurring after October 28, 1981;

(e) That the term "prime rate" as employed by United Kentucky Bank, Inc. and applied to the uncontroverted facts of this action, is not illusory and, therefore, not a breach of the contract between the parties;

(f) That Kenneth R. George is astute, sophisticated, and experienced borrowers, as reflected in their affidavits in the record;

(g) That the stipulations of counsel dated October 21, 1981 are hereby adopted as findings of this Court.

2. As a matter of law, the setting and charging by United Kentucky Bank, Inc. of its prime rate is not a breach of contract, fraud, or breach of fiduciary duty as to the defendants.

3. As a matter of law, the calculation of interest on a 360 day basis is an overcharge of interest and, there-

fore, a breach of contract, but is not a fraud or breach of fiduciary duty, owed to the defendants by the plaintiff.

4. That United Kentucky Bank, Inc. is entitled, as a matter of law, to judgment on the five (5) notes attached to its complaint and marked as Exhibits 1, 4, 6, 7 and 11.

5. That the pleadings having been closed, all amendments after June 1, 1982, were not allowed filed.

6. That all previous interlocutory orders are made final by this order.

Order

Therefore, it is the order of this Court that:

1. The plaintiffs recover of the defendants, Kenneth R. George and Alberta W. George, and each of them, jointly and severally, the sum of $723,791.69, plus accrued interest of $143,961.07, calculated on the 365 day basis, plus interest thereon at the rate of the prime rate of interest charged by United Kentucky Bank from time to time, plus one-half percent (½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

2. That the plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, and each of them, jointly and severally, the principal sum of $1,158,268.92, with accrued interest of $242,236.90, calculated on a 365 day basis, plus the prime rate of interest as charged by United Kentucky Bank from time to time, plus one and one-half percent (1½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

3. That plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, doing business as Yorktown Lumber Company, and each of them, jointly and severally, the principal sum of $150,000.00, plus accrued interest of $30,419.16, calculated on a 365 day basis, and interest at the prime rate of interest as charged by United Kentucky Bank from time to time, plus one percent (1%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment and interest at the prevailing statutory rate from the date of judgment until paid.

4. That the plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, doing business as Yorktown Lumber Company, and each of them, jointly and severally, the principal sum of $50,000.00, plus accrued interest of $9,822.53, calculated on a 365 day basis, at the prime rate of interest as charged by United Kentucky Bank from time to time plus one-half percent (½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

5. The plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, and each of them jointly and severally, the principal sum of $50,000.00, plus accrued interest of $9,882.63, from October 15, 1982, calculated on the 365 day basis, at the prime rate of interest charged by United Kentucky Bank, Inc. from time to time, plus one-half percent (½%) per annum from October 15, 1982 until date of judgment until paid, plus costs expended by the plaintiff herein, and interest from the date of judgment at the prevailing statutory rate until paid.

6. That all counterclaims and affirmative defenses as filed by the defendants are hereby dismissed except as hereinbefore set out.

7. That the plaintiff shall tender an order of sale consistent with its complaint and this order.

8. The attorneys for the plaintiffs are entitled to a fee for their services rendered herein, this matter is hereby retained for further proceedings.

9. Pursuant to CR 54.02(1), it is adjudged that this is a final and appealable judgment, and there is no just reason for delay.

/s/ Richard A. Revell
Judge, Jefferson Circuit Court
Date: October 25, 1982

TENDERED BY:

/s/ Richard Frockt
Richard Frockt
Thurman L. Sisney
BARNETT & ALAGIA
1700 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 585-4131
Counsel for United Kentucky Bank

Certificate of Service

This is to certify that a true and correct copy of the foregoing has been served, by mailing a copy of same, postage prepaid, to Larry E. Parrish, Esq. and John J. Mulrooney, Esq., Parrish & Mulrooney, 2125 First Tennessee Building, Memphis, Tennessee 38103, and Theodore H. Amshoff, Jr., Esq. and Richard W. Hill, Esq., Amshoff & Amshoff, 1445 Starks Building, Louisville, Kentucky 40202, counsel for defendants, Kenneth R. George and Alberta W. George, on this 22 day of October, 1982, in accordance with the Kentucky Rules of Civil Procedure.

/s/ Richard Frockt
Richard Frockt

APPENDIX I

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment 14, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Article 6, Cl. 2:

[2] This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Constitution of the United States, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure, Rule 12(b)(6):

(6) Failure to state a claim upon which relief can be granted.

Federal Rules of Civil Procedure, Rule 13(a):

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counter-claim under this Rule 13.

Title 15, *United States Code*, §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or dis-

tributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708.)

Title 15, *United States Code*, §15:

Any person who shall be injured in his business or property by reason of anything forbidden in the

antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

(Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.)

Title 18, *United States Code*, §1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch 645, § 1, 62 Stat. 763; May 24, 1949, ch 139, § 34, 63 Stat. 94; Aug. 12, 1970, P.L. 91-375, § 6(j)(11), 84 Stat. 778.)

Title 18, *United States Code*, §1962:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in asquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged

in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

Title 18, *United States Code*, §1964:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P. L. 91-452, Title IX § 901(a), 84 Stat. 943).

Title 28, *United States Code*, §1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 28, *United States Code*, §1332(a)(1):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

Title 28, *United States Code*, §1738:

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall

be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646, § 1, 62 Stat. 947.)

Title 28, *United States Code*, §2283:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 42, *United States Code*, §1093:

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

(R. S. § 1979.)

Kentucky Rules of Civil Procedure, Rule 8.03:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Source: FRCP 8(c); CC 95(2).

Kentucky Rules of Civil Procedure, Rule 56.01:

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

Source: FRCP 56(a).

United States Supreme Court Rules, Rule 17.1(a):

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted

only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

United States Supreme Court Rules, Rule 17.1(c):

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

United States Supreme Court Rules, Rule 23.1:

.1. After consideration of the papers distributed pursuant to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

(2)

No. 84-1392

Office-Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

KENNETH R. GEORGE and
ALBERTA W. GEORGE - - - - Petitioners

versus

LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE (f/d/b/a UNITED KENTUCKY BANK, INC.), UNITED KENTUCKY, INC., and DOES 1 through 99 - - - - - Respondents

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OPPOSITION BRIEF OF RESPONDENT, LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE

D. PAUL ALAGIA, JR.
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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Did the federal courts below properly apply the doctrines of collateral estoppel and res judicata, based on a prior state adjudication, to bar consideration of identical claims presented by petitioners in those federal courts?

LIST OF ALL PARTIES

The petitioners in this matter are Kenneth R. George and Alberta W. George (sometimes hereinafter referred to as "the Georges").

The respondent herein is Liberty National Bank & Trust Company of Louisville (hereinafter referred to as "Liberty"). Liberty is a national bank located in Louisville, Kentucky. Its parent corporation is Liberty United Bancorp, Inc. Liberty has no affiliates, and has no subsidiaries other than wholly-owned subsidiaries.

On December 23, 1982, Liberty acquired and merged with another bank which was its predecessor in interest regarding this matter. This predecessor in interest was United Kentucky Bank, Inc. ("UKB"). The respondent in this matter proceeded in the Kentucky state courts under the name of United Kentucky Bank, Inc. For the sake of consistency with the caption, the name Liberty is used throughout this response, even though the respondent is referred to in the Georges' petition, as well as in the appendices of both petitioners and respondents, as United Kentucky Bank, Inc., or UKB.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1392

KENNETH R. GEORGE and
ALBERTA W. GEORGE - - - - *Petitioners*

v.

LIBERTY NATIONAL BANK & TRUST COMPANY, OF LOUISVILLE (f/d/b/a UNITED KENTUCKY BANK, INC.), UNITED KENTUCKY, INC., and DOES 1 through 99 - *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

OPPOSITION BRIEF OF RESPONDENT, LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE

Respondent Liberty National Bank and Trust Company of Louisville respectfully submits this brief in opposition to the Petition for Writ of Certiorari filed by petitioners, Kenneth R. George and Alberta W. George, to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's dismissal of the Georges' complaint.

COUNTERSTATEMENT CONCERNING JURISDICTION

Liberty respectively suggests that, although this Court has discretion to review cases under 28 U.S.C. §1254(1) other than those specifically described in

Supreme Court Rule 17.1, certiorari in this case should be denied for failure to meet any of the standards of said Rule 17.1 or any other standard by which a case is deemed worthy of Supreme Court review.

The Georges claim in their petition three grounds under Rule 17.1: (1) a conflict between federal circuit courts of appeals on a single issue, (2) a conflict between the Sixth Circuit Court of Appeals and the Kentucky Supreme Court on a federal question, and (3) a conflict between the Sixth Circuit Court of Appeals and this Court regarding a federal question. However, the petition cites no grounds whatsoever to support the existence of these conflicts, primarily because for the Georges' purposes there are none.

Rather, the petition seeks to divert attention from the binding effect of numerous prior decisions in favor of Liberty by inviting this Court to ignore Mr. Justice Holmes' admonition that "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U. S. 220, 227 (1925).

CONSTITUTIONAL AND STATUTORY PROVISIONS

For the reasons previously stated in Liberty's jurisdictional statement, there are no federal constitutional provisions, statutes, treaties or regulations involved in this case for purposes of Certiorari.

COUNTERSTATEMENT OF THE CASE

The Georges' petition for a writ of certiorari to the Sixth Circuit is based on the outcome of two separate but duplicative cases, one in the state courts of Ken-

tucky, and one in the federal courts of the Sixth Circuit. The first judgment (almost entirely in Liberty's favor) was rendered in the Circuit Court of Jefferson County, Kentucky in late 1982. Since then, that judgment has run the full course of appellate review in the Kentucky courts. Similarly, the dismissal of the federal court case, which was based on the preclusive effect of the state court judgment, has run the full course of appellate review in the federal system, except for this Court.

Presented below is a narrative of the proceedings in the Kentucky court, followed by a narrative of the proceedings in the federal court. Also attached as Appendix A is a chronological chart of significant events as they occurred in both courts.

I. Proceedings and Disposition in the Kentucky Courts.

The state court proceedings started in the Jefferson County Circuit Court on October 27, 1981, when Liberty filed its complaint against the Georges. This state court suit was an action to collect in excess of $2,000,000 loaned to the Georges by Liberty, and to foreclose on collateral securing such sum. The debt was evidenced by a number of promissory notes and secured by various real estate mortgages and other collateral.

On January 11, 1982, the Georges filed this action against Liberty in the U.S. District Court for the Western District of Kentucky, and also filed a petition for removal which removed the Jefferson Circuit Court proceedings to the same U.S. District Court. The

Georges then filed a perfunctory answer in the federal court action commenced by the removal. The U.S. District Court promptly remanded the state court proceeding to the Jefferson Circuit Court, there being no jurisdictional basis for removal (i.e., incomplete diversity and no federal question).

Now back in state court, the Georges filed a "supplemental answer" on March 1, 1982. The state court answer expressly incorporated all allegations of the January 11, 1982 complaint which initiated this separate federal court action against Liberty.

The supplemental answer raised the defenses which were litigated in the state court by the Georges and Liberty. These defenses primarily challenged the validity of Liberty's prime rate lending practices. The supplemental answer accused Liberty of breach of contract, breach of fiduciary duty, and fraud (including mail fraud as a predicate to a RICO action) based on allegations that the Georges were charged Liberty's published prime interest rate at the same time other borrowers were allowed to borrow money from Liberty with interest based on a lower prime rate. In addition, the Georges claimed that Liberty's prime interest rate was illusory, since Liberty had discretion to move it up or down, and therefore unenforceable.

The Georges' supplemental answer also challenged Liberty's use of the 365/360 method of calculating interest as a breach of contract, breach of fiduciary duty, and fraud.

After the filing of the supplemental answer on March 1, 1982, the state court case entered a period

during which both sides took extensive discovery, including interrogatories, requests for production of documents, and depositions. The discovery was by agreement to be used in either the state or federal case.

On August 20, 1982, Liberty filed in the state court an extensive motion for summary judgment. The trial court heard arguments of counsel regarding the summary judgment on *two* occasions — October 11, 1982 and October 21, 1982.

Summary judgment for Liberty was entered on October 25, 1982. The judgment held that the promissory notes were valid and collectible with interest calculated according to Liberty's published prime rate. The judgment held for the Georges only on the limited issues of the 365/360 method of interest calculation, stating that interest should have been calculated on a 365/365 basis, and therefore, the Georges were entitled to an interest credit.

On November 4, 1982, the Georges filed in the trial court a motion to alter, amend or vacate the summary judgment, which motion was overruled in May 1983. The motion was held in abeyance for approximately six months due to the Georges' having filed bankruptcy in Tampa, Florida.

The Georges then appealed to the Kentucky Court of Appeals. That court issued an opinion on February 24, 1984. The case was reversed and remanded on the limited issue of the manner in which the interest credit was calculated. All other aspects of the summary judgment were fully affirmed.

Subsequently, the Georges filed two more requests for review in the Kentucky appellate courts. The first was a petition for a rehearing filed in the Kentucky Court of Appeals. On July 18, 1984, after the petition for rehearing was denied, the Georges then filed a motion for discretionary review in the Kentucky Supreme Court. Finally, the Kentucky Supreme Court entered an order on November 8, 1984, denying the Georges' motion for discretionary review, and the Georges' state court remedies were thus exhausted.

II. Proceedings and Disposition in the Federal Courts.

On January 11, 1982, after filing of the state court action, the Georges filed the complaint in the instant case in the U. S. District Court for the Western District of Kentucky, alleging breach of contract, breach of fiduciary duty, fraud, and RICO/mail fraud claims. No further significant action occurred in this case until June 22, 1982, when the Georges filed their "first amended complaint," which by its terms was only to "restate and clarify" the original complaint.

Again, little action occurred in the District Court case until mid-1983. On June 13, 1983, Liberty filed its motion to dismiss the complaint on the grounds of res judicata and collateral estoppel based on the state court judgment. The dismissal was granted September 30, 1983, subject to the case's being reopened if the summary judgment was overturned by a Kentucky appellate court. Shortly thereafter, the Georges appealed to the U. S. Court of Appeals for the Sixth Circuit.

While the Kentucky state court appeals were in process, the issues were fully briefed by both parties in the Sixth Circuit. That court then postponed its decision until after the Kentucky Supreme Court denied the Georges' petition for discretionary review of the Kentucky Court of Appeal's affirmance of the judgment. On January 22, 1985, the Sixth Circuit affirmed the District Court's dismissal on the basis of res judicata and collateral estoppel established by the state court summary judgment, with one exception: the issue of fraudulent inducement (as opposed to fraud in performance) with respect to the RICO claim was held not to have been actually litigated in the Kentucky courts, and so not precluded by res judicata (because of exclusive federal jurisdiction) or collateral estoppel. That single issue was remanded to the District Court for trial.[1] In all other respects, the dismissal was upheld.

REASONS FOR DENYING THE PETTTION

Although in this last effort to avoid the state court judgment, the Georges have attempted to set up a procedural due process claim, the only issues actually involved in this case are the proper applications of the doctrines of res judicata and collateral estoppel.

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[1]Nothing herein should be construed as an admission by Liberty that the Sixth Circuit was correct in remanding that single issue. Any objection to that holding by Liberty is simply not relevant to the Georges' petition for certiorari. Liberty respectfully suggests that the Sixth Circuit should have affirmed the District Court's dismissal in total.

These questions of law have already been adjudicated and reviewed in five separate courts. The federal courts below found that (with one exception) the claims in the Georges' complaint were precisely those presented and adjudicated as defenses in the Kentucky state court proceedings, and were therefore barred from further litigation by the principles of res judicata and collateral estoppel. Accordingly, the District Court dismissed the Georges' complaint, and the Sixth Circuit affirmed. Both of these decisions rely on the *specific findings* of the Jefferson County Circuit Court that Liberty properly set and charged its prime rate and possessed *no fraudulent intent* with respect to Liberty's loan transactions with the Georges. The subsidiary issues of breach of contract and breach of fiduciary duty were also decided almost entirely in Liberty's favor. The federal courts' decisions that the state court judgment was preclusive are amply supported by the undisputed facts, as well as by decisions of the Kentucky appellate courts. Try as it may, the Georges' petition raises no material federal question, establishes no conflict among higher federal courts or state courts, and presents no other issue worthy of Supreme Court review.

I. The Petition Presents No Important Issue of Federal Law.

The Georges' entire petition is fatally devoid of any support for their claims under Supreme Court Rule 17.1(a) and (c). Rather, the petition addresses the factual aspects of the case, and the correctness of the

lower court's decisions, issues which without more are not appropriate for a grant of certiorari by this Court.

A. The Petition Raises No Important Question of Substantive Federal Law.

The only substantive issue of federal law presented in the instant case is a claim by the Georges that Liberty committed numerous acts of mail fraud (28 U.S.C. §1341) and, therefore, also committed a violation of the Racketeer Influenced and Corrupt Organizations Act (28 U.S.C. §1961). The state court summary judgment held that, as a finding of fact, an essential element of both common law and mail fraud (specific intent to defraud) was clearly not present in the case, and, therefore, neither the mail fraud nor the RICO claims could be sustained as a matter of law. That decision was upheld throughout all of the state court proceedings.

In reviewing the findings in the state court, the U. S. District Court determined that the Georges' mail fraud/RICO claim was exclusively within federal jurisdiction, and therefore the state decision could not preclude that claim on the basis of res judicata. However, turning to the state court's specific findings of fact, the District Court also found that the absence of an essential factual element of the exclusively federal claim, i.e., fraudulent intent, had already been properly adjudicated. Accordingly the District Court dismissed that claim on grounds of collateral estoppel, and the Sixth Circuit affirmed.

In view of the foregoing, the only possible substantive element of the Georges' federal claims put in issue by the petition is whether or not the specific intent required for the state as opposed to the federal fraud claims is the same. Yet the Georges' petition is totally devoid of any authority even suggesting that the intent requirements are not the same for both. In short, such issue is hardly a burning question ripe for Supreme Court review.

B. The Petition Raises No Important Issue of Federal Procedure.

Several of the "questions presented" by the Georges' petition claim a denial of procedural due process under Amendments Five and Fourteen of the United States Constitution and a violation of the Supremacy Clause of Article VI of the Constitution. However, these issues were not specifically raised in any of the state courts nor the lower federal courts, as an examination of the briefs submitted and the opinions rendered in those courts will demonstrate. Therefore, constitutional claims such as these cannot properly be raised in this Court for the first time. (See, e.g., *United States* v. *Ortiz,* 422 U. S. 891, 898 (1975).

In any event, as the history of this case demonstrates, not only have the Georges received due process, they have received *undue* process! (Besides the state and federal civil court actions discussed herein, the debt of the Georges to Liberty has been substantially litigated in the U. S. Bankruptcy Courts.)

II. The Petition Presents No Conflict Among Any of the State Courts, Federal Courts of Appeals, or This Court With Respect to the Issues Raised by the Petition.

After substantial review and analysis of the Georges' petition, which is less than a model of clarity, it appears that their six questions presented can be rearranged to a reasonably understandable grouping of issues as follows:

1. As to collateral estoppel based on state court findings:
   a. Can it be used to preclude an exclusively federal claim (i.e., mail fraud/RICO? (Petition Question 4)
   b. Can it be based on a summary judgment? (Petition Question 1)
   c. Can it be used to preclude the issue of fraudulent intent where the state court dealt with common law fraud and the federal court dealt with statutory mail fraud? (Petition Question 3)
2. As to res judicata based on a state court judgment:
   a. Would the judgment have been preclusive under state law? (Petition Question 2)
   b. Was it not preclusive because the federal court allegedly had exclusive jurisdiction over the pendent state law claims? (Petition Question 5)
3. As to preclusion in general based on a state court case:
   a. Were the Georges deprived of an allegedly absolute right to litigate all issues in federal court? (Petition Question 6)

All parties are in agreement that the full faith and credit provisions of 28 U.S.C. §1738 require a federal court to give due credit to prior state judgments. As to each of the foregoing issues, the Georges' petition has demonstrated not a single relevant conflict between the Sixth Circuit and this Court, or the Kentucky Supreme Court, or any other federal Circuit Court of Appeals, and therefore presents on that ground no justification for a grant of certiorari in this case. The following discussion explains in greater detail the insufficiency of the petition for purposes of certiorari.

A. The Federal Courts Below Correctly Decided Those Collateral Estoppel Issues Presented in the Petition. (Issues 1(a), (b), and (c) above.)

It is well settled law that exclusive federal jurisdiction does not preclude the use of collateral estoppel where the same facts and issues have previously been decided, whether in state or federal court. *County of Cook* v. *Midcon Corp.*, 574 F. Supp. 902, 913 (N.D. Ill. 1983), citing *Becher* v. *Contoure Laboratories, Inc.*, 279 U. S. 388 (1929). Accord, *Cream Top Creamery* v. *Dean Milk Company*, 383 F. 2d 358 (6th Cir. 1967).

Furthermore, it is clear that collateral estoppel may be based on a summary judgment without a violation of procedural due process. There is no question that a summary judgment itself complies with procedural due process when properly supported, and also that a summary judgment is equivalent to a judgment on the merits. *Mayer* v. *Distel Tool & Machine Co.*, 556 F. 2d 798 (6th Cir. 1977). Therefore, the only question is

whether the issue of fraudulent intent was actually litigated in the Jefferson County Circuit Court.

Due process requires no specific form of procedure; it is intended to be a flexible concept. *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461 (1982). All that is required is a "full and fair opportunity" to litigate the issues in question. *Allen* v. *McCurry*, 449 U. S. 90, (1980). An issue is "actually litigated and decided when it is properly placed in dispute and is resolved by the trier of fact." *Cook, supra,* at 914. In addition, collateral estoppel requires that in the prior proceeding, the decision was supported by specific findings of facts. *Cream Top Creamery, supra.*

The Georges have asserted a totally insupportable if novel theory to the effect that although the summary judgment granted relief to Liberty on its claims, the summary judgment was not in any way an adjudication of the defenses presented by the Georges. Nothing could be further from the truth. The Jefferson County Circuit Court, following Ky. R. Civ. P. 56 (which, in effect, is the same as Fed. R. Civ. P. 56) could not have granted complete relief to Liberty without taking into consideration the defenses raised by the Georges, which expressly included all of the elements of their complaint filed in federal court.

The general rule in Kentucky is that once a prima facie case for summary judgment has been established, the burden of moving forward shifts to the opponent, who must show sufficient evidence to prove (1) that some issue of material fact exists, *and* (2) that such issue supports at least one plausible legal theory. (See

e.g., *Neal* v. *Welker*, 426 S. W. 2d 476 (Ky. 1968).) The burden of proof on the Georges' behalf was minimal, and yet they failed to sustain it.

In this case, the summary judgment was rendered just short of one year after the Georges filed their complaint. During that period, many pleadings, motions, and briefs were filed, a wealth of discovery was taken, and numerous hearings were held (including two hearings on the summary judgment). The issue of whether Liberty acted with fraudulent intent was squarely placed in issue by the Georges' filing of their supplemental answer, which included all of the claims in their federal court action.

In addition, Judge Revell of the Jefferson County Circuit Court wrote a detailed opinion including specific findings of fact and law on the issue of fraudulent intent. Similarly, the District Court made a thorough review and set forth detailed conclusions and rationales in its opinion. In short, all of the procedures involved in arriving at the summary judgment, and in dismissing the Georges' federal case on the basis of that judgment, were proper, and the Georges' petition cites no relevant authority to the contrary.

Finally, the Georges' contention that the summary judgment did not litigate the elements of fraud required to prove mail fraud under 18 U.S.C. §1341 is equally unfounded. Both actions require specific intent to defraud. (See, e.g. *United States* v. *Kreimer*, 609 F. 2d 126, 128 (5th Cir. 1980).) The Georges' petition presents no evidence or authority for the proposition that the "fraudulent intent" of each cause of

action is not exactly the same; all of the cases cited by them deal with differences in *conduct* required for each type of fraud, but show no variance regarding *intent*. The federal courts below acquired a perfectly appropriate basis for the use of res judicata and collateral estoppel from the results of the state court litigation between the Georges and Liberty, and the Georges have cited no decision of the Kentucky Supreme Court, another Circuit Court of Appeals, or this Court which holds otherwise.

B. The Federal Courts Below Correctly Decided Those Res Judicata Issues Presented by the Petition (Issues 2(a) and (b) above).

The Georges' petition challenges the application of res judicata to justify the District Court's dismissal on two grounds: that res judicata would not have applied in another Kentucky court under Kentucky law, and that the District Court had exclusive jurisdiction over the state claims appended to their RICO/mail fraud claims. Again, these arguments are without support.

The Georges' claim that the state court's summary judgment would not have been held res judicata by other Kentucky courts has no support. The Georges admit that Kentucky law on this issue was controlling in the District Court, and that the authoritative case is *Newman* v. *Newman*, 451 S. W. 2d 417 (Ky. 1970). Then they proceed to substantially misconstrue that case.

The rule in Kentucky is that res judicata covers "every point which properly belonged to the subject

of litigation." *Newman, supra,* p. 419. The foregoing statement is not just dictum; it is an essential statement of the law necessary to support the decision of the *Newman* court, which held that res judicata was not applicable on the facts in that case. Of course, on its facts alone, *Newman* is easily distinguishable from this case. In *Newman,* the causes of action were not the same, the second cause of action had not even arisen at the time of the first suit, and the second suit was based on numerous facts which would not have been germane to the first proceeding. Clearly that is not the case between Liberty and the Georges. Therefore, the general rule cited above would govern this issue in another Kentucky court. The Georges have never disputed the fact that the claims asserted in the federal court action arose out of the *very same transactions* as those involved in the state court action. In fact, the Georges placed those same issues before the state court by the incorporation of their federal complaint in their state court supplemental answer. The state court necessarily reached those claims in its decision, and flatly rejected them. Once that decision was rendered, it stood as res judicata to bar further litigation of those claims in the federal court.

The other claim of the Georges to bar the use of the state court judgment as res judicata is that the federal court had exclusive jurisdiction over the pendent state claims. The Georges cite no relevant authority for this proposition because it is patently untrue. Even as to federal questions arising under federal statutes, there is a *presumption* that the jurisdiction of federal and

state courts is *concurrent*. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981). *A fortiori*, concurrent jurisdiction obviously applies to claims arising under state law. *Will* v. *Calvert Fire Insurance Company*, 437 U. S. 655 (1978). There is a substantial difference, which the Georges fail to discern, between the *discretion* of the federal court to hear state claims, and an *obligation* to do so. The cases cited by the Georges deal only with discretionary jurisdiction over pendent state claims.

C. Petitioners' Claim of a Lack of Procedural Due Process Based on a Purported Absolute Right to Litigate in Federal Court Is Totally Without Merit.

The Georges have substantially misconstrued the scope of jurisdiction of the federal courts. Contrary to their contentions, no one has an absolute right to litigate in federal court except in those few instances where federal jurisdiction is exclusive (*Allen* v. *McCurry*, 449 U. S. 90 (1980)), pursuant to a federal statute which expressly grants exclusive jurisdiction. Furthermore, even where exclusive federal jurisdiction attaches, certain claims may still be barred by res judicata or collateral estoppel. *Nash Cty. Bd. of Ed* v. *Biltmore Co.*, 640 F. 2d 484 (4th Cir.), *cert. denied*, 454 U. S. 878 (1981). In the vast majority of cases (particularly where the statute is silent like RICO), the federal and state courts have concurrent jurisdiction.

It was the Georges' decision to move forward with the state case rather than actively prosecute the federal court case; they cannot now be heard to complain when

they have had far more than one "full and fair" opportunity" to litigate the issues in this case, and, if the Sixth Circuit decision is fully affirmed, will have yet another day in federal district court. Again, their petition fails to demonstrate any significant conflict on this issue among the higher courts of the state and federal systems.

CONCLUSION

It must be re-emphasized that throughout the case, the Georges never attempted to have the Kentucky proceedings stayed during the pendency of the federal court action, to object to the jurisdiction of the state court, or to consolidate the two cases. They actively prosecuted the state case while essentially ignoring the federal case in which practically no action was taken until after the summary judgment in the Jefferson Circuit Court was rendered. Only then did the Georges suddenly decide they should have a second opportunity to litigate in federal court. Without question, the Georges have had full consideration of their claims in the appellate courts of Kentucky, both intermediate and supreme, as well as the lower federal courts. Therefore, that second opportunity to litigate identical issues was properly denied by the District Court and the Sixth Circuit, with all due process.

There is no reason of the type described in United States Supreme Court Rule 17.1 for this Court to grant review on certiorari, nor are any other issues raised by the Georges which qualify as worthy of certiorari. For the reasons discussed herein, Liberty National

Bank & Trust Company of Louisville respectfully requests that this Court deny the Georges' petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE AND FEDERAL COURT PROCEEDINGS

CASE	DATE	EVENT
State	10/27/81	Liberty filed a complaint in Jefferson County Circuit Court, Case No. 81-CI-09925, for collection of notes and foreclosure on collateral including real and personal property and guaranties.
Federal	1/11/82	The Georges filed their complaint in the Federal District Court, alleging fraud, breach of contract, breach of fiduciary duty, and RICO violations by mail fraud.
State	1/11/82	The Georges filed their petition for removal of the state action to federal court.
State	1/13/82	The Georges filed a perfunctory answer in the removed state case.
State	2/23/82	The removed case was remanded to state court for lack of subject matter jurisdiction (incomplete diversity and no federal question).
State	3/ 1/82	The Georges filed a "Supplemental Answer" in state court incorporating their January 11 federal court complaint as a defense in the state court action.
State	6/ 4/82	A default judgment was entered in the State court proceeding against the Georges as a sanction for failure to obey the court's orders concerning discovery.

CASE	DATE	EVENT
Federal	6/22/82	The Georges filed their first amended complaint in the federal court, which by its terms merely "restates and clarifies" the original complaint.
State	7/15/82	The default judgment in the state court action was set aside.
State	8/20/82	Liberty filed its motion for summary judgment in the state court.
State	10/11/82	First hearing on summary judgment.
State	10/21/82	Second hearing on summary judgment.
Federal	10/21/82	The Georges offered an amendment to their complaint to include a claim of fraudulent inducement. The amendment was not permitted to be filed, due to the Georges having promised no further alterations of the complaint as partial consideration for having the default judgment set aside.
State	10/25/82	SUMMARY JUDGMENT for Liberty was entered in the state court.
State	11/ 4/82	The Georges filed a motion to alter, amend, or vacate the summary judgment, which was shortly thereafter denied.
State	11/25/82	The Georges filed a motion of appeal of the summary judgment.
Federal	6/13/83	Liberty filed its motion to dismiss in federal court on the grounds of *res judicata* and collateral estoppel.
Federal	9/30/83	DISMISSAL was granted to Liberty.

CASE	DATE	EVENT
Federal	10/12/83	The Georges filed a notice of appeal of the dismissal.
State	2/ 2/84	THE KENTUCKY COURT OF APPEALS AFFIRMED the Jefferson Circuit Court's summary judgment.
State	3/14/84	The Georges filed a petition for rehearing in the Kentucky Court of Appeals, which was subsequently denied.
State	7/18/84	The Georges filed a motion for discretionary review by the Kentucky Supreme Court.
State	11/ 8/84	DISCRETIONARY REVIEW BY THE KENTUCKY SUPREME COURT WAS DENIED.
Federal	1/22/85	THE SIXTH CIRCUIT AFFIRMED the District Court's dismissal except for the fraudulent inducement claim re RICO.
Federal	2/ 4/85	Liberty filed a petition for rehearing in the Sixth Circuit Court.
Federal	2/21/85	Liberty's petition for rehearing was denied.
State	2/ 4/85	The Georges filed for certiorari in the U. S. Supreme Court regarding the Kentucky Supreme Court decision.
Federal	2/22/85	The Georges filed for certiorari in the U. S. Supreme Court regarding the Sixth Circuit decision.

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No. 84-1392

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH R. GEORGE and ALBERTA W. GEORGE,
Petitioners,

vs.

LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE (formerly doing business as United Kentucky Bank, Inc.), UNITED KENTUCKY, INC. and DOES 1-99,
Respondents.

REPLY OF PETITIONERS TO OPPOSITION BRIEF OF RESPONDENT, LIBERTY NATIONAL BANK AND TRUST COMPANY OF LOUISVILLE

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PRELIMINARY STATEMENT

It is first necessary to take note of what was not filed. That is, though the petition and all of the proceedings below, including the complaint in the district court, the judgment of dismissal by the district court and the Sixth Circuit decision, named, as parties defendant in the district court, as appellees in the Sixth Circuit

and as respondents in the instant proceedings, United Kentucky, Inc. and DOES 1-99, neither filed any opposition to the instant petition. There is no doubt that the district court dismissed the complaint as to United Kentucky, Inc. and DOES 1-99. (Pet. App. pp. A7-A19) The district court cites no reason for the dismissal different from the reasons for its dismissal against United Kentucky Bank, Inc.; in fact, the district court memorandum decision often referred to UKB simply as "the Bank." But, the judgment of dismissal used the following words found in Petition Appendix at A20:

> IT IS FURTHER ORDERED AND ADJUDGED that *defendants'* Motion to Dismiss be and the same hereby is sustained. (Emphasis added)

The thing which makes this such an important fact is that neither respondent, United Kentucky, Inc. nor respondent, DOES 1-99, were parties to any of the state court proceedings. In the petition (Pet. Et. pp. 7, 27), petitioner brought to this Court's attention the facts that the district court had dismissed and the Sixth Circuit affirmed the dismissal of the complaint against United Kentucky, Inc. and DOES 1-99.

This preliminary statement is included simply to remind the Court that the opposition brief which has been filed is not filed for or on behalf of respondents, United Kentucky, Inc. or DOES 1-99. Quite frankly, it is literally impossible on any basis to justify the dismissal of the complaint against these respondents. Not filing a brief in opposition quite likely was strategically decided in an attempt to avoid calling attention to these latter two respondents and hoping this Court would overlook their existence and assume there to be only one respondent, i.e., United Kentucky Bank, Inc. (hereinafter "UKB.")

ERRONEOUS ASSERTIONS IN BRIEF IN OPPOSITION FILED BY UKB

On page 11 of the UKB brief in opposition, it is stated that petitioners raise a question as to whether the doctrine of collateral estoppel can bar subsequent litigation of an "exclusively federal claim." Collateral estoppel never bars a "claim."[1]

The federal/state dichotomy is a total irrelevancy when discussing what collateral estoppel does or does not bar, and petitioners have never claimed otherwise. Collateral estoppel bars relitigation of already actually litigated historical facts, nothing more and nothing less. If parties to a subsequent suit have previously taken advantage of an opportunity to fully and fairly litigate to *resolution* a fact of ultimate significance to the prior proceedings, it is irrelevant whether or not that fact was litigated in a state court, or a federal court. To the knowledge of petitioners, there is no such thing as a fact which is "exclusively federal." On the same page 11, UKB erroneously contends that petitioners raised a question as to whether a fact previously determined in a summary judgment proceeding can be given collateral estoppel effect in a subsequent proceeding. Nothing could be further from anything contended by petitioners. The

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1. Throughout its brief, UKB shows a confusion which probably causes some of the error in its positions. That is, there is continual misuse of the word "claim" and the phrase "cause of action." These are sometimes used synonymously and, at various times, used with varying definition. A "claim" is an element of a "cause of action" but it is a confusing misstatement to refer to a "cause of action," as a "claim." This is an exceedingly important distinction when the subject at hand is res judicata.

actual position of petitioners is stated in the first new paragraph on page 10 of the petition.

In its brief, UKB shows no indication of any understanding concerning the importance of the ultimate fact requirement. Even a full and fair prior adjudication of a fact of only mediate significance to the proceeding in which it was adjudicated is not barred from relitigation in a subsequent proceeding.

UKB, though never clearly stating it, premises all of its contentions regarding collateral estoppel on an obvious underlying belief that collateral estoppel, like res judicata, has preclusive effect on relitigation of all facts, both ultimate and mediate, previously litigated or which "could have been" previously litigated in a prior proceeding. These propositions are the antithesis of the law.

Also on page 11 of the UKB brief, it is suggested that petitioners contend that "it" [the doctrine of collateral estoppel] cannot be employed to bar a subsequent adjudication in federal court of "fraudulent intent" because the fraudulent intent dealt with in state court was that necessary to establish common law fraud and the "fraudulent intent" to be adjudicated in federal court was that necessary to establish statutory mail fraud. This again is a misstatement which, probably, is based on misperception by UKB.

There is no question that "it" [the doctrine of collateral estoppel] may be employed to bar relitigation of any historical fact of ultimate significance to the proceeding in which it is resolved adjudicated after a full and fair hearing. Petitioners contend that statutory mail fraud, including the specific intent necessary to commit mail fraud, was neither a fact of ultimate significance in the state court proceeding nor was there even any opportunity or attempt

in the state court to litigate such facts. The district court wrote as follows in its memorandum opinion included in Pet. App. B pp. A17-A18:

> Third, Judge Revell's finding that there was no 'fraud' in the UKB's actions is sufficient to act as collateral estoppel to fraud in a RICO action.
>
> Under Kentucky law, 'fraud' consists of the elements of (1) a material misrepresentation, (2) which is false, (3) known to be false or made recklessly, (4) made with inducement to be acted upon, (5) acted in reliance thereon, and (6) causing injury. (citations omitted) Specific intent to deceive, i.e., 'scienter' is a required element. (citations omitted)
>
> [S]pecific intent is also a required element of this [statutory mail fraud] offense. . . . [I]n this case, Judge Revell found no specific intent to defraud . . . Therefore, Judge Revell's finding operates as a bar to any further action on the RICO claim.

The first three elements of fraud under Kentucky law deal with the necessity of a *representation known to be false*, and the second three deal with the purpose for the false misrepresentation and the *success of the defrauder in causing reliance* on the misrepresentation by the victim and *injury* to the victim.

Comparing the "specific intent to defraud" necessary under Kentucky law with the "specific intent to defraud" necessary under the mail fraud statute, quite literally, is like an attempt to compare apples with oranges. A complete violation of the mail fraud statute can be accomplished without any misrepresentation. Since no misrepresentation is required, it is nonsense to suggest the necessity of reliance. And, quite importantly, there need be no in-

jury suffered by anyone in order to defraud under the mail fraud statute.

The question is: Specific intent to do what? When used in reference to mail fraud, the word "defraud" means something substantially different than what is meant when the word "defraud" is used with reference to the Kentucky law of fraud.

In addition to the authorities cited in the petition, perhaps the following analysis of time-tested case authorities, shortened only by space limitations, will be helpful. *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949) says at 766:

> [That] the . . . crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means . . . that *a showing of loss to the victim is not necessary* . . . . (Emphasis added)

The Third Circuit has most recently surveyed and clarified the applicable law. First, in *United States v. Frankel*, 721 F.2d 717 (3rd Cir. 1983) at 917:

> We caution that the mail fraud statute may be violated even in the absence of active misrepresentations.

Continuing at 919:

> [D]ictum in our earlier case of *United States v. Pearlstein*, . . ., underlies the prosecution's difficulty.
>
> *Pearlstein* . . . said that '[t]he scheme need not be fraudulent on its face . . . but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.' (citation omitted)
>
> *Pearlstein*, however, should not be read so narrowly. . . . The basic question presented here, which was

> not at issue in *Pearlstein*, is . . . [w]hether a fraudulent scheme executed without a misrepresentation is within the scope of this statute.

Continuing at 920:

> We joined those courts of appeals that have not confined the mail fraud statute to schemes aimed at deprivation of money or property. However, the courts that have accepted the notion that a deprivation of intangible rights is within the statute recognize that an active misrepresentation is not necessary. Instead, the prosecution need prove only a recognizable scheme formed with intent to defraud regardless of how that intent manifests itself in execution. (citation omitted) Schemes to defraud come within the scope of the statute even absent a false representation.

More recently, the Third Circuit spoke to the point in *United States v. Clapps*, 732 F.2d 1148 (3rd Cir. 1984) at 1153:

> We reviewed the following decisions of other courts holding that section 1341 encompasses schemes that deprive persons of intangible rights or interests. (citation to eight cases omitted)

Epstein, explicitly held that the test concerning whether conduct amounted to fraud, for purposes of the mail fraud statute, was whether "the transactions were fair and above criticism in every way" amounted to a "fair course of dealing" were "*inherently* dishonest" or "inconsistent with moral uprightness." (Id., 174 F.2d at 768)

In *Epstein* (174 F.2d at 766), this court stated that *Shushan*, 117 F.2d at 115 is the "rule of law." Therefore, the language there is notable as follows at 117 F.2d at 115:

> But there may be a scheme to defraud by other means than express false representations. A scheme . . .

> by corrupting one who acts for another or advises him, would be a scheme to defraud *though no lies were told* . . .

On page 10 of UKB's brief, UKB states that the difference in common law fraud and statutory mail fraud "is hardly a burning question ripe for Supreme Court review." To the contrary, this is a looming question of immense importance and directly relevant to this Court in its disposition of cases currently pending before this Court. *Haroco, Inc. v. American National Bank and Trust Company of Chicago,* 747 F.2d 384 (7th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-822); *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 741 F.2d 482 (2d Cir. 1984), *cert. granted,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (No. 84-648); *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3367 (U.S. Oct. 24, 1984) (No. 84-657); *Furman v. Cirrito,* 741 F.2d 524 (2d Cir. 1984). Obviously, this Court has decided to resolve the raging dispute concerning the elements of civil RICO. It is impossible to read the conflicting adjudications on civil RICO without having to admit that there is a philosophically resistent contingent of the bench and bar which searches out every argument conceivable to attack the civil RICO statute. The most recent device is to avoid dealing with RICO directly but strike the primary underlying predicate offense, mail fraud. *DeCarlo v. Southland Corporation,* ..... F.2d ....., No. 83-1525 (6th Cir. Dec. 7, 1984). The result is to superimpose common law fraud standards on the mail fraud statute including, primarily, the necessity for misrepresentation and loss to the victim. This would absolutely revolutionize mail fraud principles well-tested and developed in the law for over a century and do away with the "first line of defense" referred to by The Chief Justice in *United States v. Maze,* 414 U.S. 395, 405-406 (1974).

This is the perfect time for this Court to shore up and reestablish the underpinnings of the mail fraud statute to avoid the inevitable disarray in the administration of justice which will follow this Court's disposition of *Haroco, Sedima, Furman,* and *Bankers Trust* if not dealt with now.

Neither of these cases presents for resolution by this Court any issue concerning mail fraud and its distinctiveness when compared with common law fraud. It is rare for this Court to have the opportunity to address this subject in a civil case; if it were addressed by this Court in a criminal case, lower courts disinclined to follow this Court's ruling in a civil RICO case would use the excuse that this Court had not ruled on this issue in a civil case.

Further, this is the perfect case for this Court to address the mail fraud issue. Here, the Sixth Circuit has remanded the case to the district court for a limited trial on common law fraudulent inducement and, if the mails were used, civil RICO based thereon. However, the district court, as quoted above, has already ruled that mail fraud is encumbered with the Kentucky common law elements and, in addition to affirming this ruling (Pet. App. A p. A6), the Sixth Circuit has recently rendered its opinion in *DeCarlo,* supra, which essentially does the same thing. Thus, unless this Court reverses the error, petitioners will be forced to trial on this erroneous standard.

Respectfully submitted,

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